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No. 06-____

IN THE

Supreme Court of the United States

TOMMIE GLANTON, ON BEHALF OF THE ALCOA PRESCRIPTION DRUG PLAN, AND ALL OTHER SIMILARLY-SITUATED PLANS, AND TARA MACKNER, ON BEHALF OF THE KMART COMPREHENSIVE HEALTH PLAN, PETITIONERS

v.

ADVANCE PCS HEALTH, L.P.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 2007

QUESTION PRESENTED

Did the Ninth Circuit erroneously hold that the express congressional grant of statutory standing in Sections 502(a)(2)-(3) of ERISA violates Article III of the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Tommie Glanton, on behalf of the ALCOA Prescription Drug Plan and all other similarly-situated plans, and Tara Mackner, on behalf of the Kmart Comprehensive Health Plans, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 465 F.3d 1123. The order and opinion of the district court granting respondent's motion for judgment on the pleadings (App., *infra*, 9a-18a) and the order of judgment dismissing the complaints entered November 7, 2003 (App., *infra*, 19a-20a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 17, 2006 (App., *infra*, 1a-8a). A timely petition for rehearing and rehearing *en banc* was denied on January 8, 2007 (App., *infra*, 21a). On April 3, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 23, 2007. No. 06-A-941. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Rule 29.4(b), petitioners certify that 28 U.S.C. § 2403(a) may apply and that this petition has been served on the United States Solicitor General.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (29 U.S.C. § 1001 *et seq.*), are reproduced at App., *infra*, 33a-36a.

STATEMENT OF THE CASE

1. ERISA is a federal statute that regulates "employee benefit plans," 29 U.S.C. § 1002(3), which include "employee welfare benefit plans" maintained by an employer "for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits." 29 U.S.C. § 1002(1). Employee welfare benefit plans are commonly called "employee health plans."

2. As of 2002, 137 million workers, retirees, and their families were covered by ERISA employee health plans.[1] Almost all private health insurance in the United States is provided through employer-sponsored plans and is thus subject to ERISA.[2]

Total spending on health care in the United States was $2 trillion in 2005, and is projected to reach $2.9 trillion in 2009.[3] Private employers contributed over $500 billion to ERISA employee health plans in 2003.[4] Due to rising health care costs, private employers have increasingly shifted ERISA health plan expenses to employees, and the percentage of private health insurance premiums paid by

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[1] Brief of the Secretary of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowland,* 367 F.3d 638 (CA6 2004) at 13.

[2] Lorraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights,* 42 BRANDEIS L. J. 529, 538 (2004).

[3] National Coalition on Health Care, *Facts on Health Care Costs,* at http://www.nchc.org/facts/2007%20updates/cost.pdf.

[4] Employee Benefit Research Institute, *Finances of Employee Benefits, 1960-2003* (Jan. 2005), at http://www.ebri.org/pdf/publications/facts/0205fact.b.pdf.

employers declined from a high in 2000 of 76.0 percent to 74.6 percent in 2003.[5]

The average employee contribution to employer-sponsored ERISA health plans has increased more than 143 percent since 2000,[6] and currently exceeds $100 million each year.[7] Between 2000 and 2005, the average employee out-of-pocket costs for deductibles, co-payments for medications and co-insurance for physician and hospital visits rose 115 percent.[8]

3. Section 502(a) of ERISA is entitled "Civil Enforcement." This section sets forth the exclusive remedies available under the statute.[9] The importance of Section 502(a) can hardly be overstated: Section 502(a) provides the only means for the remediation of most wrongs suffered in the employee health care context. This is the result of the extraordinary breadth of subject matter covered by the ERISA statute coupled with an extremely strong ERISA preemption doctrine.[10]

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[5] Cathy A. Cowan & Micah B. Hartman, *Financing Health Care: Businesses, Households and Governments, 1987-2003*, 1 Health Care Financing Review (Web Exclusive) 11 (July 2005), at http://www.cms.hhs.gov/HealthCareFinancingReview/downloads/Web_Exclusive_Cowan.pdf.

[6] *Facts on Health Care Costs*, *supra* note 3.

[7] Cowan & Hartman, *supra* note 5, at 10.

[8] *Facts on Health Care Costs*, *supra* note 3.

[9] *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

[10] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.").

Specifically, Section 502(a) "contains a six-part list of remedies, of which the final three, subsections (4)-(6), are peripheral. Subsections (1)-(3) * * * constitute the three remedy provisions upon which virtually all claims by ERISA participants and beneficiaries are brought."[11] The question presented by this petition involves the constitutional validity of subsections (2) and (3).[12]

Section 502(a)(2) is restricted to actions for fiduciary liability under 29 U.S.C. § 1109 and provides that "a civil action may be brought * * * by the Secretary, or a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109(a) in turn provides that "a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable * * * to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate." "Section 409(a) [29 U.S.C. § 1109] provides for recovery by the plan, as opposed to recovery by the participant or beneficiary who brings suit on behalf of the plan. In such a case, the participant or beneficiary would benefit indirectly, by enhancing the value of the plan's assets."[13]

Section 502(a)(3) similarly authorizes lawsuits by "a participant, beneficiary, or fiduciary (A) to enjoin any act or

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[11] John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail Of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1334 (2002) (footnotes omitted).

[12] Routine benefit denials are governed by Section 502(a)(1), and Section 502(a)(4) concerns various reporting and disclosure requirements. Neither Section 502(a)(1) nor 502(a)(4) is at issue in this case.

[13] Langbein, *supra* note 11, at 1334.

practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan." Section 502(a)(3) is a "catchall" provision that authorizes participants and beneficiaries to obtain "appropriate equitable relief for injuries caused by violations that Section 502 does not elsewhere adequately remedy."[14]

4. Petitioner Tommie Glanton is an employee of ALCOA and a participant in the ALCOA Prescription Drug Plan, an employer-sponsored ERISA health plan (the "ALCOA Plan"). Petitioner Tara Mackner was an employee of Kmart and a participant in the Kmart Comprehensive Health Plan, another employer-sponsored health care plan (the "Kmart Plan"). Both the ALCOA Plan and the Kmart Plan are funded by contributions made by the plan sponsors (*i.e.*, ALCOA and Kmart), as well as co-insurance, deductibles, co-payments, and other contributions made by Glanton, Mackner, and the other plan participants and beneficiaries.

The prescription drug benefits provided by both the ALCOA Plan and the Kmart Plan (the "Plans") are administered by Advance PCS Health, L.P. ("AdvancePCS"). AdvancePCS is a pharmacy benefits manager, or "PBM," for the Plans. AdvancePCS and other PBMs process prescription drug claims for ERISA plans in return for administrative fees. AdvancePCS is responsible not only for prescription drug claims administration on behalf of the Plans, but also the development and modification of formularies, establishment of retail pharmacy networks, negotiation of pricing arrangements with network pharmacies, and negotiation with drug manufacturers to provide rebates to the Plans. In short,

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[14] *Id.* at 1335.

AdvancePCS decides what drugs are purchased by the Plans, from whom, and on what basis. Moreover, when a plan participant or beneficiary presents a prescription from a physician to a pharmacy, AdvancePCS makes the determination whether to purchase the drug, to reject the claim, or to switch the participant to a different drug (*e.g.*, to a generic or other substitute).

5. On March 21, 2002, Glanton filed a civil action against AdvancePCS, and on March 31, 2003, Mackner filed a similar action, on behalf of the Plans pursuant to Sections 502(a)(2) and (a)(3). Glanton and Mackner (collectively, "petitioners") alleged that AdvancePCS violated its fiduciary duties to the Plans through, *inter alia*, (1) obtaining payments, discounts, rebates, and other fees from drug manufacturers without passing this undisclosed compensation to the Plans; (2) creating and pocketing a "spread" in discount and dispensing fees (*e.g.*, paying a pharmacy only 80 percent of the full price of a drug but charging the Plans 85 percent of the full price, retaining the 5 percent "spread" for itself); (3) enriching itself through "drug-switching," in which AdvancePCS encouraged the use of substitutes manufactured or sold by the companies with whom AdvancePCS has favorable contractual arrangements, generating additional profits for AdvancePCS but an increase in costs for the Plans and their participants; and (4) retaining interest on the "float" during the period between when rebates are paid to AdvancePCS and when AdvancePCS elects to transmit these rebates to the Plans.

Petitioners alleged that AdvancePCS received and retained this compensation in violation of the anti-inurement provisions of 29 U.S.C. § 1103, which provide that "all assets of an employee benefit plan shall be held in trust" and that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to the participants of the plan and their

beneficiaries." Petitioners further alleged that AdvancePCS was required to disgorge all such compensation to the Plan, and should be enjoined from retaining future compensation, pursuant to 29 U.S.C. § 1109(a), which provides that "a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this subchapter shall be personally liable * * * to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate." Because petitioners were participants in and beneficiaries of the Plan, Section 502(a)(2) expressly entitled them to seek such relief, as this subsection provides that "a civil action may be brought * * * by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."

6. Petitioners' lawsuits were subsequently consolidated, and on November 7, 2003, the district court granted AdvancePCS judgment on the pleadings and dismissed petitioners' complaints. App., *infra*, 9a-20a.

Petitioners timely appealed to the Ninth Circuit. The Secretary of Labor submitted to the Ninth Circuit a brief *amicus curiae* in support of petitioners in which she argued that the district court had improperly dismissed the complaints. The Secretary contended that Congress's express grant of standing to plan participants and beneficiaries in Section 502(a) was not a violation of Article III of the Constitution and that "[t]he district court erred in holding that plaintiffs lacked standing to bring their suit on behalf of the Plans." App., *infra*, 32a; see also generally *id.* at 22a-32a. Specifically, the Secretary argued that ERISA Section 502(a) – consistent with Article III – validly authorized participants and beneficiaries of a plan to sue on behalf of that plan because, *inter alia*, (1) Section 502(a) constitutionally granted participants and beneficiaries the statutory right to

recover for injuries to the plan resulting from breaches of fiduciary duty, and such statutory standing was consistent with both historical precedent and Article III;[15] (2) petitioners had representational standing, pursuant to Section 502(a), sufficient under Article III to seek relief on behalf of the Plans;[16] and (3) petitioners likely also suffered injury-in-fact from the breaches of fiduciary duty by AdvancePCS as a result of both the impact of these breaches on the financial integrity of the Plans[17] as well as from increased co-payments and restricted drug choices.[18]

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[15] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 24a ("[S]ince the Appellants are statutorily authorized to bring an action on behalf of their Plans against a functional fiduciary for breach of duty, it is immaterial whether Appellants themselves suffered an injury in fact. Any alleged losses are recoverable by the Plans, which have allegedly been injured by fiduciary breaches. This is enough to establish standing for Article III purposes.").

[16] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 28a ("Because * * * the plaintiffs have representational standing under section 502 to sue to redress the alleged injuries to the Plans, they meet the causation and redressability prongs of Article III standing as well. Plaintiffs' claim that the disloyal actions by Advance injured the Plans, and injunctive or monetary relief could conceivably remedy that injury.").

[17] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 28a ("Section 502(a)(2), the enforcement provision for § 409, authorizes suit by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries. Inclusion of the Secretary of Labor is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole. [T]he common interest shared by all four classes is the financial integrity of the plan." (quoting *Russell*, 473 U.S. at 142 n.9)).

[18] *See, e.g.*, Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 31a ("We note that in the present case, however, the participants and beneficiaries

The Ninth Circuit issued a published opinion on October 17, 2006 in which it held that Congress had indeed expressly granted petitioners the right to sue AdvancePCS for breach of fiduciary duty and to recover on behalf of the Plans. App., *infra*, 3a. The Ninth Circuit, however, concluded that this congressional grant of statutory standing in Section 502(a) violated Article III of the Constitution. The Ninth Circuit rejected the Secretary's arguments that valid statutory and representational standing existed because, in the court's view, "ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans – as would the benefits of injunctive relief." App., *infra*, 5a. The Ninth Circuit also rejected the alternative argument that Section 502(a) was constitutional because ERISA participants and beneficiaries suffer injury-in-fact on the ground that while recovery on behalf of the Plans might well reduce co-payments, drug costs, or employee contributions, "nothing would force ALCOA or K-Mart to do this," and they might instead merely reduce their own contributions to the Plans. App., *infra*, 4a. The Ninth Circuit thus held that the grant of standing to plan participants and beneficiaries in Section 502(a) violated Article III of the Constitution.

Petitioners timely filed a petition for rehearing and rehearing *en banc*, which the Ninth Circuit denied on January 8, 2007. App., *infra*, 21a.

This petition for a writ of certiorari followed.

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may well show that they have or will likely suffer an injury in fact. The participants and beneficiaries in the Alcoa Plan are subject to a co-payment. Also, they are restricted to the use of certain formularies. If the rebates and discounts are returned to the Plans, it is possible that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and possibly a more comprehensive benefit structure.").

REASONS FOR GRANTING THE WRIT

The Ninth Circuit held that Sections 502(a)(2) and 502(a)(3) of ERISA violate Article III of the Constitution notwithstanding the express creation by Congress therein of a statutory right of participants and beneficiaries to sue plan fiduciaries on behalf of the plan. This decision invalidates the central and most critical enforcement mechanism of ERISA. As the Secretary of Labor argued in her *amicus* brief to the Ninth Circuit, the inability of plan participants and beneficiaries to file actions under Section 502(a) will cause massive harm to the financial integrity of ERISA health plans as well as dramatically alter the "carefully integrated civil enforcement provisions" enacted by Congress in Section 502(a).[19] Moreover, as the Secretary of Labor correctly noted below, the Ninth Circuit's invalidation of Section 502(a) on standing grounds is entirely inconsistent with this Court's precedents.

This Court's ordinary practice is to grant certiorari when a court of appeals invalidates a federal statute, even in the absence of a circuit conflict.[20] That practice is consistent with this Court's admonition that declaring a statute unconstitutional is the "gravest and most delicate" of judicial

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[19] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 25a.

[20] *See, e.g., Ashcroft v. ACLU,* 542 U.S. 656 (2004); *United States v. Morrison,* 529 U.S. 598 (2000); *National Endowment for the Arts v. Finley,* 524 U.S. 569 (1998); *Babbitt v. Youpee,* 519 U.S. 234 (1997); *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995); *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995); *United States v. Edge Broad. Co.,* 509 U.S. 418 (1993); *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307 (1993); *cf.* Robert L. Stern et al., SUPREME COURT PRACTICE 244 (8th ed. 2002) ("Where the decision below holds a federal statute unconstitutional * * * certiorari is usually granted because of the obvious importance of the case.").

tasks, *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and also with this Court's own guidelines concerning certiorari review, which indicate that certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).

The enforcement mechanisms enacted by Congress in Section 502(a) are both essential to the financial integrity of employee ERISA health plans and do not violate Article III. The critical nature of the ERISA enforcement regime, as well as the sheer number of Americans and amount of money implicated by the resolution of the question presented, heightens the significance of the constitutional validity of Section 502(a). Moreover, this petition presents an ideal opportunity for this Court to resolve broader issues regarding the validity of statutory standing under Article III as well.

Section 502(a)(2) of ERISA provides that "a civil action may be brought * * * by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."[21] Section 502(a)(3) further authorizes lawsuits by "a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan."[22]

Petitioners were participants and beneficiaries of the Plans. They alleged that AdvancePCS breached its fiduciary duties to the Plans by accepting and retaining undisclosed compensation that belonged to the Plans.[23] As remediation

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[21] 29 U.S.C. § 1132(a)(2).

[22] 29 U.S.C. § 1132(a)(3).

[23] *See, e.g.*, 29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants

for these breaches, petitioners sought equitable and injunctive relief that, *inter alia*, required AdvancePCS to disgorge all such compensation to the Plans.[24]

The Ninth Circuit recognized that Section 502(a) expressly authorized petitioners, as ERISA participants and beneficiaries, to bring such an action but held that such congressionally authorized standing violated Article III of the Constitution. The Ninth Circuit reasoned as follows:

> To establish standing under *Lujan* [*v. Defenders of Wildlife*, 504 U.S. 555 (1992)], plaintiffs must show a likelihood that the injury they have suffered will be redressed by a favorable outcome to the litigation. * * * [Plaintiffs] claim that Advance PCS charged the plans too much for drugs, and that this caused the plans to demand higher co-payments and contributions from participants. Plaintiffs claim that, if their suit is successful, the plans' drug costs will decrease, and that the plans might then reduce contributions or co-payments. But nothing would force ALCOA or K-Mart to do this * * * ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted. * * * ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans—as would the benefits of injunctive relief.[25]

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and beneficiaries and – (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries."); 29 U.S.C. § 1103(c)(1) ("[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries.").

[24] *See* 29 U.S.C. § 1109(a) (expressly authorizing such relief).

[25] App., *infra*, 3a-5a.

Review of the question presented is warranted for two reasons. First, as the Secretary of Labor recognized below, the validity of participant and beneficiary standing granted by Section 502(a) to sue for breaches of fiduciary duty is of exceptional importance, and is critical to the effective enforcement of ERISA.[26] Second, as the Secretary of Labor also correctly identified below, the Ninth Circuit's invalidation of Section 502(a) is inconsistent with this Court's precedents.[27]

A. The Question Presented is of Exceptional Importance.

For most participants of employee health plans, filing a civil action under Section 502(a) is the only means through which losses caused by the misconduct of a fiduciary may be recovered, as state law claims against a breaching fiduciary are preempted by ERISA. As a result, the Ninth Circuit's holding that the congressional grant of standing in Section 502(a) violates Article III makes the substantive provisions of ERISA effectively unenforceable.

As the Secretary of Labor explained below, the "carefully integrated civil enforcement provisions" of Section 502(a) are designed not only to ensure that breaches of duty by plan fiduciaries are sufficiently deterred, but also that the consequences of prior fiduciary misconduct are promptly and effectively remedied.[28] The ability of participants and beneficiaries to file suit against plan fiduciaries pursuant to Section 502(a) is essential to the "carefully integrated" ERISA enforcement regime established by Congress.

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[26] *See* Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 23a-25a.

[27] *Id.*, App., *infra*, 25a-31a.

[28] *Id.*, App., *infra*, 25a.

Actions by participants and beneficiaries on behalf of the plan are a deliberate and central feature of ERISA. As this Court noted in *Russell*, Section 502(a)(2) "authorizes suits by four classes of party-plaintiffs, the Secretary of Labor, participants, beneficiaries, and fiduciaries" for relief to the plan for a fiduciary breach of 29 U.S.C. § 1109. 473 U.S. at 142 n.9. The Ninth Circuit's invalidation of participant and beneficiary standing under Section 502(a)(2) would thus leave enforcement of § 1109 exclusively to the Secretary of Labor and the plan fiduciaries.[29]

Plan fiduciaries cannot be expected to bring breach of fiduciary duty claims against themselves.[30] This leaves suits by the Secretary of Labor as the sole available enforcement mechanism against plan fiduciaries. However, not only are lawsuits by the Secretary of Labor a small fraction of ERISA actions, but Congress correctly concluded in Section 502(a)(2) that such actions alone would not suffice, and that lawsuits by informed and interested plan participants and beneficiaries were instead essential to the enforcement of § 1109.[31]

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[29] ERISA does not permit plan sponsors (*e.g.*, ALCOA and Kmart) to file breach of fiduciary duty claims, nor does the plan itself have any such right. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 134, 209 (2002); *Harris v. Provident Life*, 26 F.3d 930, 933 (CA9 1994).

[30] Other plan fiduciaries, if any exist, are likely to lack incentive to bring claims against other fiduciaries. Moreover, under the Ninth Circuit's holding, because any such claims must be brought on behalf of the plan, these fiduciaries would lack Article III standing, as any injury (and monetary relief) would be to the plan rather than to the fiduciary. In any event, it was precisely because Congress did not trust plan fiduciaries to bring fiduciary duty claims that Section 502(a) authorized actions by plan participants and beneficiaries.

[31] *See* S. Rep. No. 93-127, at 35 (1973); H.R. Rep. No. 93-1280, at 301, 320-27 (1974) (Conf. Rep.); 120 Cong. Rec. 29,933 (1974).

Exclusive reliance upon enforcement actions by the Secretary of Labor would negate the effective enforcement of ERISA against plan fiduciaries for two additional reasons as well. First, while Section 502(a)(2) authorizes lawsuits by the Secretary to enforce 29 U.S.C. § 1109, the Secretary is not permitted to bring actions alleging other breaches of fiduciary duty – or violation of the plan itself – pursuant to Section 502(a)(3).[32] The Ninth Circuit's invalidation of plan participant and beneficiary standing under Article III thus entirely removes the ability to bring Section 502(a)(3) fiduciary duty claims. Moreover, under the Ninth Circuit's holding, if plan participants and beneficiaries lack Article III standing, then the Secretary of Labor almost certainly lacks standing as well, as the Secretary suffers less injury-in-fact than the participants and beneficiaries of the plan. Alternatively, as explained *infra*, if Congress may invest the Secretary with Article III standing as a representative of the plan, it may validly do so for plan participants and beneficiaries as well.

The Ninth Circuit's invalidation of Section 502(a) on Article III standing grounds removes the central enforcement mechanism of ERISA. Moreover, as the Secretary of Labor cogently noted below, the Ninth Circuit did so in a manner directly contrary to the "carefully integrated" fashion through which Section 502(a) applies and enforces duties against plan fiduciaries. As the Secretary explained:

> [I]n holding that ERISA does not permit claims for compensatory damages (which it termed "extra contractual"), the Supreme Court reasoned that those

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[32] 29 U.S.C. § 1132(a)(3) (authorizing only suits by "a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan").

> who sue under section 502(a)(2) may do so only to recover for injury to the plan. *Russell*, 473 U.S. at 148. * * * Given that section 502(a)(2) therefore does not encompass claims for individual relief at all, courts following *Russell* have denied recovery to participants and beneficiaries suing for relief under this provision. *See Hozier* [*v. Midwest Fasteners, Inc.*, 908 F.2d 155, 1162 n.7 (CA7 1990)] (claim to recover individual benefits not authorized under sections 409 and 502(a)(2) because these provisions only allow "individual participants to sue in a representative capacity on behalf of the plan"); *Carr v. Malcolm & Riley, P.C.*, No. 90-6407, 1991 WL 67749, at *8 (E.D. Pa. Apr. 25, 1991) (same). It would be irrational, indeed, to conclude that participants must show individual harm in order to have standing to sue under Section 502(a)(2), but they cannot individually recover for that harm under that very provision.[33]

Under the Ninth Circuit's interpretation of Section 502(a), the breaching fiduciary of an employee health plan will enjoy almost total immunity from even the most egregious violations of ERISA. Fiduciaries will be able, as here, to self-deal, or even to steal directly from the plan, with *no risk whatsoever* that a participant or beneficiary will be able to file an action to recover these ill-gotten proceeds or to enjoin such misconduct.

Each year, as noted *supra* at 2-3, over $500 billion in assets are contributed by employers and employees to ERISA health plans, and over 20 million participants and beneficiaries are covered by such plans in the Ninth Circuit

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[33] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 29a.

alone. Section 502(a) provides the only effective means through which these critical health care assets are protected.

As this Court noted in *Great-West*, because ERISA "is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system," and contains a "carefully crafted and detailed enforcement scheme," this Court has "been especially reluctant to tamper with the enforcement scheme." 534 U.S. at 209. The Ninth Circuit's invalidation of Section 502(a) vitiates the delicate enforcement regime carefully designed by Congress to safeguard the half-trillion dollars contributed yearly to ERISA health care plans that provide critical medical care to 137 million workers. This decision by the Ninth Circuit cries out for review by this Court.

B. The Ninth Circuit's Invalidation of Section 502(a) Conflicts With This Court's Precedents.

As the Secretary of Labor correctly argued below, the grant of standing in Section 502(a) to plan participants and beneficiaries to seek relief on behalf of their plans does not violate Article III. This is true for two distinct reasons. First, plan participants and beneficiaries suffer injury-in-fact from the diversion of plan assets. Second, wholly apart from their own injuries, plan participants and beneficiaries have valid statutory standing to file suit as representatives of their plan.

1. The Ninth Circuit's holding conflicts with this Court's injury-in-fact precedents.

For Article III standing to exist based upon injury-in-fact, litigants must suffer the concrete invasion of a legally protected interest that will be redressed by a favorable outcome of the litigation. *Lujan*, 504 U.S. at 561. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the

controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The Ninth Circuit held that participants and beneficiaries do not have injury-in-fact standing because even were they to recover millions of dollars from a plan fiduciary on behalf of the plan, employers might respond to such recovery by reducing their own contributions to the plan, thereby offsetting any recovery.[34] Such a possibility, however, does not obviate Article III standing, and participants and beneficiaries suffer injury-in-fact notwithstanding this potentiality for multiple independent reasons.

First, the Ninth Circuit's holding is both temporally and doctrinally misguided. Regardless of how employers *might* potentially respond to recovery on behalf of the Plans, the immediate result of the lawsuit would be to infuse the Plans with millions of dollars in additional funds. Pursuant to the anti-inurement provisions of ERISA, these sums would be required to be expended on participants and beneficiaries, as § 1103(c)(1) requires that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive benefit of providing benefits to participants in the plan and their beneficiaries."[35] Actions under Section 502(a)

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[34] *See* App., *infra*, 4a ("[Plaintiffs] claim that AdvancePCS charged the plans too much for drugs, and that this caused the plans to demand higher co-payments and contributions from participants. Plaintiffs claim that, if their suit is successful, the plans' drug costs will decrease, and that the plans might then reduce contributions or co-payments. But nothing would force ALCOA or K-Mart to do this. * * * ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted.").

[35] 29 U.S.C. § 1103(c)(1). Whether, as noted *infra*, the employer subsequently responds by decreasing its own contributions is irrelevant,

thus provide the type of immediate and concrete benefit to participants and beneficiaries sufficient to create standing under Article III.

Second, in a related manner, regardless of the employer's eventual response, participants and beneficiaries immediately and concretely benefit from recovery on behalf of the plan pursuant to Section 502(a) because the infusion of such sums tangibly advances the financial integrity of the plan. This is not only an immediate and concrete benefit to participants and beneficiaries, but as this Court expressly noted in *Russell*, such a result is precisely why Congress enacted Section 502(a)(2) in the first place:

> Section 502(a)(2), the enforcement provision for § 409, authorizes suit by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries * * * * [T]he common interest shared by all four classes is the financial integrity of the plan.

473 U.S. at 142. The infusion of millions of dollars into a health care plan, especially in an era of corporate implosions (*e.g.*, Enron) and bankruptcies (*e.g.*, Kmart), is a concrete and immediate benefit to the financial integrity of the plan

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as participants and beneficiaries obtain an immediate benefit from the infusion of money that is statutorily required to be expended on their behalf. Moreover, given that the anti-inurement provisions of ERISA expressly provide that assets of the plan, including those recovered on behalf of the plan pursuant to Section 502(a), "shall never inure to the benefit of an employer," § 1103(c)(1) may itself preclude employers from diminishing their own contributions in response to recovery by the plan, as allowing such a response would mean that plan assets "inure[d] to the benefit of the employer" in precisely the manner prohibited by § 1103(c)(1). *See also* 29 U.S.C. § 1104(a)(1)(A)(i) (containing additional analogous provisions).

sufficient to create Article III standing on behalf of participants and beneficiaries.[36]

Third, the Ninth Circuit's reliance upon what an employer might potentially do in response to recovery on behalf of the Plans in assessing Article III standing is both doctrinally irrelevant and inconsistent with this Court's precedents. The immediate result of any recovery under Section 502(a) is the infusion of millions of dollars into a plan. The mere fact that a third party might potentially respond to such recovery by diminishing other contributions is not dispositive. A college student, for example, clearly has Article III standing to sue a defendant for $5,000 in personal injuries even if the student's father (or rich uncle) might potentially decrease his contribution to the student's college fund penny-for-penny for every dollar that the student recovers from the tortfeasor.

This Court has repeatedly held that Article III standing exists notwithstanding potential follow-on conduct of a third party in response to success in litigation. Most recently, for example, in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), this Court held that the plaintiff demonstrated injury-in-fact from potential global warming sufficient to satisfy Article III even though the requested regulation of greenhouse gas emissions by the United States could easily be overwhelmed by emissions from China and India (and, perhaps, that these

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[36] This is especially the case given the importance of the integrity of such plans to participants and beneficiaries. *Mertens v. Kaiser Steel Ret. Plan*, 744 F. Supp. 917, 921 (N.D. Cal. 1990) ("In Section 409 actions, plan participants and beneficiaries lack the direct right to relief typically held by class members, since the actions are brought on behalf of the plans. Nevertheless, they retain vital interests in those suits, since any equitable or monetary relief awarded to the plan would ultimately benefit them. * * * For health and welfare plan participants and beneficiaries, the plan may be all that stands between them and devastating medical bills."), *aff'd*, 948 F.2d 1105 (CA9 1991).

countries might respond to the United States' reduced emissions by increasing their own). *Id.* at 1458.

The Ninth Circuit's interpretation of Article III is also flatly inconsistent with this Court's unanimous decision in *Bryant v. Yellen*, 447 U.S. 352 (1980). *Bryant* held that farmworkers who wanted to buy land in the Imperial Valley had Article III standing to challenge a regulation that would make it less expensive to irrigate parcels over 160 acres on the theory that invalidation of the regulation might drive down the market price of such parcels. *Id.* at 367-68. There was in *Bryant* nothing that would *force* prices to decline, or that would *force* any landowner to sell her land, or that would *force* an owner to sell her property to the plaintiffs rather than to someone else. *Cf.* App., *infra*, 4a ("[T]he plans might then reduce contributions or co-payments. But nothing would *force* ALCOA or K-Mart to do this."). *Bryant* nonetheless held that the fact that the subsequent acts of a third party could potentially obviate the benefits of recovery did not vitiate Article III standing. 447 U.S. at 367-68.

The fact that China, India, Imperial Valley landowners, rich uncles, or employers with health plans might potentially act adversely to a victory by the plaintiff does not deprive the federal courts of Article III standing.[37] The Ninth Circuit's

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[37] It is one thing to say, as Justice Kennedy did in his separate opinion in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), that generalized taxpayer standing does not exist under Article III merely because a lawsuit might financially benefit the State and hence potentially result in lower taxes or better schools. *Id.* at 613-14 (opinion of Kennedy, J.) ("As an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's interest in the moneys of the treasury are shared with millions of others, is comparatively minute and indeterminable; and the effect on future taxation * * * so remote, fluctuating and uncertain, that no basis is afforded for judicial intervention." (citations omitted)). It is quite another, however, to say that Congress cannot validly permit the recovery

invalidation of Section 502(a) based upon a contrary view conflicts with both doctrine and this Court's precedent.

Fourth, Section 502(a) complies with the injury-in-fact requirements of Article III because recovery by participants and beneficiaries would provide them with a concrete and cognizable "bargaining chip" in future funding of the plan. The Ninth Circuit argued that an employer might potentially respond to recovery of millions on dollars on behalf of a plan by diminishing its own contributions to the plan. Even if this is a possibility,[38] so is the converse; more importantly, the unanticipated infusion of millions of dollars into the plan would provide employees with a substantial bargaining chip with which to argue that employee co-payments, deductibles, and other contributions should be reduced (or at least not increased further) in light of this unanticipated recovery, and that the employer should at least share this monetary windfall with participants and beneficiaries.

This Court has repeatedly found that the creation of such a "bargaining chip" satisfies the requirements of Article III standing. For example, in *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court held that Snake River Potato Growers, which often negotiated to acquire potato processing facilities, had Article III standing to challenge the Line-Item Veto Act because the use of that Act by President Clinton deprived them of "a statutory bargaining chip" during those potential purchases. *Id.* at 432. The Court held:

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of private funds from a fiduciary through a suit filed on behalf of a small and insular set of participants and beneficiaries and on whose behalf those recovered funds are statutorily required to be expended.

[38] *But see supra* note 35 (noting that such a response by the employer might well be prohibited by the anti-inurement provisions of ERISA).

> By depriving them of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents. *See, e.g., Investment Company Institute v. Camp*, 401 U.S. 617, 620 (1971); 3 K. Davis & R. Pierce, ADMINISTRATIVE LAW TREATISE 13-14 (3d ed. 1994) ("The Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement.").

Id. at 432-33; *see also id.* at 433 (discussing the existence of Article III standing on this same basis in *Bryant*). Participants and beneficiaries who recover millions of dollars on behalf of a plan pursuant to Section 502(a) generate a substantial bargaining chip with which they may pressure their employers – either individually or through collective bargaining – to continue the same employer contributions they had already agreed to make and to use the windfall to increase coverage or reduce employee costs. The recovery of such a multi-million dollar bargaining chip is a sufficiently concrete benefit to ensure sufficient interest in the controversy and hence Article III standing for participants and beneficiaries of a plan.

Fifth, Section 502(a) satisfies Article III because recovery on behalf of the plan will likely result in a reduction of participant and beneficiary costs. As noted *supra*, employers regularly – and increasingly – respond to higher health care plan costs by reducing coverage and/or increasing employee co-payments and deductibles.[39] It does not take a degree (or firm belief) in trickle-down economics to recognize that the unexpected infusion of millions of dollars into a plan, as well

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[39] *See* Facts on Health Care Costs, *supra* note 3.

as injunctive relief that results in millions of dollars in additional yearly rebates from fiduciaries, will diminish the pressure on employers to restrict coverage or increase employee costs. As the Secretary of Labor argued below:

> We note that in the present case, * * * the participants and beneficiaries may well show that they have or will likely suffer an injury in fact. The participants and beneficiaries in the Alcoa Plan are subject to a co-payment. Also, they are restricted to the use of certain formularies. If the rebates and discounts are returned to the Plans, it is possible that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and possibly a more comprehensive benefit structure. Although the Plans' sponsor may take any recovered rebates and discounts and use these funds at their own disposal, this does not foreclose the possibility that the Appellants may directly benefit from a judgment in their favor.[40]

The likelihood of such concrete benefits is more than adequate to ensure a "personalized stake" in the controversy sufficient for constitutional standing under Article III.

Finally, even if the Ninth Circuit is somewhat dubious about the benefits to participants and beneficiaries of recovery on behalf of a plan pursuant to Section 502(a), Congress and the Executive Branch are not. Congress authorized participant and beneficiary standing under Section 502(a) precisely because it concluded that such individuals would benefit from recovery of plan assets from breaching

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[40] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 31a.

fiduciaries.[41] The Department of Labor has similarly concluded that fiduciaries who obtain compensation (as AdvancePCS does) from assets of the plan may adversely affect participants.[42] Indeed, the entire purpose of congressionally authorized participant and beneficiary standing under Section 502(a) was to ensure that these individuals, who are the ones most directly affected by a breach of fiduciary duty and the resulting increase in health care costs, are entitled to sue.

As Justice Kennedy wrote in *Lujan*, and as this Court recently reiterated in *Massachusetts v. EPA*, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 127 S. Ct. at 1453 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). Congress has done precisely that in Section 502(a). While Congress must "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit," and while a wholly generalized "citizen suit[] to vindicate the public's nonconcrete interest in the proper administration of the laws" may be insufficient, *id.*, neither barrier exists here. Congress has expressed in Section 502(a) its belief that recovery on behalf of a plan will sufficiently benefit a select, discrete group – participants and beneficiaries in that plan – such that these individuals should be entitled to seek relief. When, as here, Congress has "articulated a chain of causation" and has expressly granted standing to discrete parties that may well be affected by recovery, Article III does not preclude the assertion of such a congressionally authorized remedy.

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[41] S. Rep. No. 93-127, at 35; H.R. Rep. No. 93-1280, at 301, 320-27; 120 Cong. Rec. 29,933.

[42] *See, e.g.*, Department of Labor Field Assistance Bulletin 2002-3 (Nov. 5, 2002), at http://www.dol.gov/ebsa/regs/fab 2002-3.html.

Section 502(a)(2) and (a)(3) are thus valid because participants and beneficiaries have adequate injury-in-fact sufficient to satisfy Article III. The Ninth Circuit accordingly erred when it struck down these essential and irreplaceable components of the "carefully integrated" ERISA enforcement regime enacted by Congress.

2. The Ninth Circuit's holding conflicts with this Court's representational standing precedents.

As the Secretary of Labor strenuously argued below, Section 502(a) is also consistent with Article III because participants and beneficiaries have valid representational standing, which does not require a litigant to demonstrate that she has suffered her own injury. Participants and beneficiaries have representational standing for three reasons.

First, participants and beneficiaries have valid representational standing to file suit on behalf of the Plans. As this Court has made clear, Section 502(a)(2) "authorizes suits by four classes of party-plaintiffs, the Secretary of Labor, participants, beneficiaries, and fiduciaries," and each such party brings its claims "in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9. Just as executors, trustees, and guardians *ad litem* need not show injury-in-fact to themselves to sue on behalf of another, so too may (and does) Section 502(a) validly permit participants and beneficiaries to sue as representatives of the plan. As the Secretary of Labor explained below:

> [S]ince the Appellants are statutorily authorized to bring an action on behalf of their Plans against a functional fiduciary for breach of duty, it is immaterial whether Appellants themselves suffered an injury in fact. Any alleged losses are recoverable by the Plans, which have allegedly been injured by

> fiduciary breaches. This is enough to establish standing for Article III purposes.

App., *infra*, 24a. Because the Plans have suffered injury-in-fact, and because Section 502(a) expressly authorizes participants and beneficiaries to sue in a representative capacity on behalf of the Plans, Article III standing exists. As the Secretary of Labor further explained:

> Because * * * the plaintiffs have representational standing under section 502 to sue to redress the alleged injur[i]es to the Plans, they meet the causation and redressability prongs of Article III as well. Plaintiffs[] claim that the disloyal actions by Advance injured the Plans, and injunctive or monetary relief could conceivably remedy that injury. Again, the focus of inquiry is on the Plans.[43]

Section 502(a) accordingly satisfies Article III because it validly grants representational standing to participants and beneficiaries to file suit for recovery on behalf of a Plan that has suffered injury-in-fact.

Second, at a minimum, Section 502(a)(2) properly authorizes participants and beneficiaries to sue as representatives of the Secretary of Labor. Section 502(a)(2), unlike Section 502(a)(3), expressly authorizes the Secretary to bring actions against plan fiduciaries, and alleged violations of 29 U.S.C. § 1109 may accordingly be brought by the Secretary as well as by plan participants and beneficiaries. If, as is likely the case,[44] the Secretary has Article III standing to

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[43] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 28a.

[44] *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (noting that the United States has

vindicate the United States' substantial interest in the enforcement of ERISA, Section 502(a)(2) satisfies Article III by authorizing the directly affected participants and beneficiaries to sue in a representative capacity on its behalf.

There is no risk here that Section 502(a)(2) authorizes wholly generalized citizen actions. To the contrary, Section 502(a)(2) limits those with representational standing to those "within the zone of interests to be protected or regulated by the statute;" *i.e.*, to participants and beneficiaries.[45] Because Congress may grant representational standing to private litigants for injuries to the United States,[46] and because Section 502(a)(2) expressly authorizes participant and beneficiary suits for violations of 29 U.S.C. § 1109, such

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standing for both economic injury as well as for injury to its sovereignty arising from the violation of its laws).

[45] *Valley Forge Christian Coll. v. Americans United For Separation of Church and State*, 454 U.S. 464, 473 (1982). Although the "zone of interests" test concerns prudential standing, and thus does not apply here since Congress indisputably may (and has in Section 502(a)) override prudential concerns and authorize standing to the full extent of Article III, the limited nature of the representational standing granted by Section 502(a) strongly supports its validity.

[46] *Vermont Agency of Natural Res.*, 529 U.S. at 772. The Ninth Circuit concluded that standing existed in *Stevens* only because the *qui tam* suit there assigned a portion of the recovery to the plaintiff, whereas no such financial assignment exists here. Respectfully, this interpretation turns *Stevens* on its head, since Justice Scalia expressly noted therein that representative standing might well exist for the principal relief granted by the statute (*e.g.*, money recovered by the United States), and that difficult standing questions arose *only* with respect to that portion of the recovery assigned to the relator. *Id.* at 772-73 ("It would perhaps suffice to say that the relator here is simply the statutorily designated agent of the United States, in whose name * * * the suit is brought. * * * For the portion of the recovery *retained by the relator*, therefore, some explanation of standing other than agency for the Government must be identified." (emphasis added)).

individuals have permissible Article III representative standing on behalf of the United States.

Finally, Section 502(a) does not violate Article III because participants have "statutory standing" as well. As this Court has repeatedly held, "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Sedin*, 422 U.S. 490, 500 (1975); *see also Lujan*, 504 U.S. at 578 (same). Congress has expressly granted ERISA participants and beneficiaries the statutory right to recover for their plan all compensation improperly obtained by a breaching fiduciary. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2), & 1132(a)(2). As the Secretary of Labor has explained:

> Thus, where, as here, an entity is alleged to have violated its statutory duties as a fiduciary to ERISA plans, that violation creates standing in those (such as the participants) who are authorized to sue to enforce those duties. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., with whom Blackmun and Powell, J.J., join, concurring) (statute conferred standing that would have been doubtful under Article III in the absence of the statute).[47]

The congressional grant of statutory standing to participants and beneficiaries in Section 502(a) is as valid as similar statutory grants previously upheld by this Court. *See, e.g.*, *Havens Realty v. Coleman*, 455 U.S. 363, 373-75 (1982) (statutory standing under Fair Housing Act for "testers" who had no intent to rent); *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1, 6 (1968) (standing to challenge conduct of Tennessee Valley Authority). Indeed, because the statutory standing

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[47] Brief of the Secretary of Labor As *Amicus Curiae* in Support of Appellant and Requesting Reversal, App., *infra*, 27a.

provided by Section 502(a) is granted not only to a discrete group (moreover, one that may well suffer injury-in-fact), but also provides standing for suits against private fiduciaries (rather than the government),[48] the validity of statutory standing here is far greater than in many other cases in which this Court has found such standing consistent with Article III.

Participants and beneficiaries have an express statutory right, pursuant to Section 502(a), to bring an action for disgorgement and other equitable relief from a breaching fiduciary on behalf of their ERISA health plans. The Ninth Circuit erroneously held that Section 502(a) violated Article III. Participants and beneficiaries have valid injury-in-fact, as well as representational, standing. The invalidation of this central ERISA enforcement mechanism by the Ninth Circuit should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[48] *Cf. Lujan*, 504 U.S. at 578 (intimating that statutory standing may perhaps be limited "in suits against the Government"). This is because "the law of Article III standing is built on a single basic idea – the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), and the authorization of generalized citizen suits against the government may implicate such concerns. By contrast, when, as here, standing exists purely to resolve suits involving private parties (*e.g.*, for breach of fiduciary duty), such Article III concerns are minimal.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15328

TOMMIE GLANTON, on behalf of the ALCOA Prescription Drug Plan and all other similarly-situated plans, et al.; TARA MACKNER, on behalf of the KMart Comprehensive Health Plan
Plaintiffs–Appellants,

v.

ADVANCEPCS INC,
Defendant-Appellee

OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
October 18, 2005—San Francisco, California

Filed October 17, 2006

Before: Alex Kozinski and Ferdinand F. Fernandez, Circuit Judges, and Terry J. Hatter, Jr., District Judge

Opinion by Judge Kozinski

KOZINSKI, Circuit Judge:

We consider whether prescription drug plan participants who have suffered no judicially cognizable injury may sue their plans' fiduciaries under the Employee Retirement Income Security Act of 1974 ('ERISA").

Facts

AdvancePCS is a pharmacy benefits management company (PBM). PBMs manage prescription drug benefit programs and seek to reduce their clients' drug costs by pooling claims and negotiating volume discounts with pharmaceutical companies. Among AdvancePCS's clients are employee welfare benefit plans sponsored by ALCOA and K-Mart.

When AdvancePCS receives a prescription from one of the plan participants, it decides whether to buy the drug preferably from a seller with whom it has negotiated a discount), reject the claim or switch the participant to another drug.

AdvancePCS pays for the drugs with plan assets after accounting for the participant's co-payment. Plaintiff allege that, in addition to earning fees from the plans, AdvancePCS has secretly been keeping the spread between what it charges the plans for drugs and what it pays suppliers—a practice plaintiffs claim violates ERISA.

Plaintiff Tommie Glanton works for ALCOA and is a member of its prescription drug plan. Plaintiff Tara Mackner was a member of the K-Mart plan, but ceased working for K-

Mart after the suit was filed and thus no longer participates in its plan.[1]

Plaintiffs sued Advanced PCS under ERISA for breach of fiduciary duty. The district court found that plaintiffs lacked standing. Plaintiffs appeal.

Analysis

1. ERISA authorizes plan participants to sue fiduciaries for losses the plan suffers from a breach of their duties. 29 U.S.C. §§ 1109, 1132(a). A plan fiduciary is defined as anyone who exerts "any discretionary authority ... respecting management of such [a] plan." 29 U.S.C. § 1002(21)(A).

AdvancePCS easily fits this definition. In choosing whether to fill a prescription or shift a participant to a different drug, it exercises discretion over the plans' assets. While AdvancePCS is not named as a plan fiduciary, the applicable section of ERISA makes no distinction between named and unnamed fiduciaries. *See* 29 U.S.C. § 1002(21)(A); see also *Kayes* v. *Pac. Lumber*, 51 F.3d 1449, 1458-61 (9th Cir. 1995). It follows that plaintiffs here are authorized to sue AdvancePCS for breach of fiduciary duty.

2. Plaintiffs, nevertheless, cannot proceed unless they have Article III standing. See Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997). They claim to meet the traditional standing requirements outlined by Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Alternatively, they contend that they have standing as congressionally authorized representatives of the injured plans.

To establish standing under Lujan, plaintiffs must show a likelihood that the injury they have suffered will be

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[1] The parties dispute whether Mackner lost whatever standing she had when she stopped working for K-Mart. Because we conclude that Mackner lacked standing in the first place, we do not reach this question.

redressed by a favorable outcome to the litigation. *Id.* at 560-62. Plaintiffs don't claim they were denied benefits or received inferior drugs. Rather, they claim that AdvancePCS charged the plans too much for drugs, and that this caused the plans to demand higher co-payments and contributions from participants. Plaintiffs claim that, if their suit is successful, the plans' drug costs will decrease, and that the plans might then reduce contributions or co-payments. But nothing would force ALCOA or K-Mart to do this, nor would any one-time award to the plans for past overpayments inure to the benefit of participants. ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted. There is no redressability, and thus no standing, where (as is the case here) any prospective benefits depend on an independent actor who retains "broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); *see also Fernandez* v. *Brock*, 840 F.2d 622, 627 (9th Cir. 1988).

Other circuits that have considered this issue have reached the same conclusion. *See Cent. States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care*, 433 F.3D 181, 201 (2d Cir. 2005); *Horvath v. Keystone Health Plan E.*, 333 F.3d 450, 455 (3d Cir. 203); *Harley* v. *Minnesota Mining & Mfg.*, 284 F.3d 901, 906 (8th Cir. 2002).

We therefore turn to plaintiffs' argument that they have standing to bring this lawsuit as representatives of the plan. Plaintiffs rely heavily on *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), which upheld qui tam actions against an Article III standing challenge. Relators in qui tam actions are congressionally authorized to sue for redress of injuries suffered by the United States. Qui tam plaintiffs retain a

percentage of the recovery; the rest goes to the United States. The issue in Vermont Agency was whether the fact that qui tam plaintiffs have suffered "no . . . invasion" of any "legally protected right" precludes them from having Article III standing. *Id.* at 772-73.

The Court concluded that the False Claims Act (FCA) "can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator, and that an "adequate basis for the relator's suit [could be found] in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773. The Court noted "the long tradition of *qui tam* actions in England and the American Colonies," and that it has "routinely" entertained suits by assignees. *Id.* at 773-74.

We find the qui tam analogy inapt. Whereas qui tam actions have existed for centuries, there is no similar tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans.[2] More importantly, the FCA assigns relators a concrete stake in qui tam cases by giving them a piece of the action. *Id.* at 772. ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans—as would the benefits of any injunctive relief.[3]

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[2] Traditionally, trust law, on which ERISA is based, does not allow beneficiaries to bring suit on behalf of the trust. *See Restatement (Second) of Trusts* § 214 cmt. b. ("A particular beneficiary cannot maintain a suit for a breach of trust which does not involve any violation of duty to him.").

[3] Plaintiffs point to language in *Vermont Agency* that they claim supports their position: "It would perhaps suffice to say that *the relator here is simply the statutory agent of the United States*." 529 U.S. at 772 (emphasis added). According to plaintiffs, they, too, have been designated by statute as the agents of their respective plans, and have standing, just like qui tam relators. But, plaintiffs' truncated quotation omits an important qualifier: "in whose name (as the statute provides) the suit is brought—and that the realtor's bounty is simply the fee he receives

Plaintiffs argue, more generally, that "representative damages litigation is common—from class actions under Fed. R. Civ. P. 23(b)(3) to suits by trustees representing hundreds of creditors in bankruptcy to *parens patriae* actions by state government to litigation by and against executors of decedents' estates." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1319 (7th Cir. 1992), quoted with approval in *United Food & Commercial Workers Union Local No. 751* v. *Brown Group, Inc.* 517 U.S. 544, 557 (1996). None of these examples is particularly relevant to our case, because in each the plaintiff has a direct stake in the outcome of the litigation. A party can only serve as class representative if he has a personal claim that is representative of the claims of other class members; while he also litigates the case on behalf of the class members. Trustees and executors, likewise, have a

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out of the United States' recovery for filing and/or prosecuting a successful action on behalf of the Government." *Id.* (emphases omitted). As the omitted portion of the sentence makes clear, the Supreme Court started with the assumption that a qui tam relator has an interest in the outcome of the lawsuit because he stands to gain a part of any recovery. The Court thus had no cause to consider the situation where a party is authorized to bring suit on behalf of another party, but is given no stake in the outcome.

The passage, read in context, is even more problematic. In the immediately succeeding sentence, the Court notes that "the statute gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery." *Id.* (emphasis omitted). "There is no doubt, of course," the Court further noted, "that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a 'concrete private interest in the outcome of [the] suit." *Id.* (quoting *Lujan*, 504 U.S. at 573) (alteration in original). The balance of the opinion deals with the difficult question of whether Congress *may* give a third party a stake in a lawsuit seeking to redress the invasion of somebody else's rights. The Court concludes (as we note in text) that it does, on the theory that a part of the claim is assigned to the relator. Because the opinion's rationale hinges on the existence of such an assignment, it cannot apply to plaintiffs here, who have been assigned no right to any portion of the recovery.

stake in the litigation because they are acting on behalf of the estate, which owns the claims being litigated. Finally, governmental entities have a concrete stake in the proper application of the laws of their jurisdiction, giving them a sufficient basis for Article III standing in *parens patriae* cases. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).[4]

Nor can plaintiffs find comfort in the associational standing cases, where the Supreme Court has held that associations or unions may bring suit to redress the rights of their members, even though the suing entity itself suffered no injury. *See, e.g., United Food & Commercial Workers*, 517 U.S. at 558. These cases turn on the fiction that an individual member authorizes the group to sue on his behalf. As the Court discussed it in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the association "and its members are in a very practical sense identical." Id. at 459, *quoted in United Food & Commercial Workers*, 517 U.S. at 552. When the Association is "organized for a purpose germane to the subject of its member's claim . . . the association's litigators will themselves have a stake in the resolution of the dispute,

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[4] Like the district court, we find *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), and *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994), inapposite. Both of these cases held that ERISA beneficiaries could seek a constructive trust for ill-gotten gains fiduciaries allegedly received as a result of breaching their duties. The question was not standing, but whether ERISA authorized a remedy that would inure to the benefit of the plan participants rather than the plan. We concluded that it did, because the plans had been dissolved and any recovery would otherwise cycle back to the wrongdoers. This removed any doubt as to standing because it gave the beneficiaries a concrete stake in the lawsuit. Plaintiffs here do not seek a constructive trust for their own benefit, or any other remedy that would entitle them to any amount recovered in this lawsuit. Nor could they, because any recovery could not inure to the benefit of AdvancePCS.

and thus be in a position to serve as the defendant's natural adversary." *United Food & Commercial Workers*, 517 U.S. at 555-56.

The theory underlying the associational standing cases does not operate in reverse: By joining the association, the member gives some indication that the association represents his interests; but in accepting his membership, the association gives no reciprocating signal that the member represents its interests. Thus, a health plan might be able to sue on behalf of its injured subscribers even if the plan suffered no injury itself, but not vice versa. To hold otherwise would turn the associational standing caselaw on its head—fatally undermining any limitation the requirement of concrete injury places on constitutional standing.

Finally, plaintiffs point to *Massachusetts Mutual Life Insurance* v. *Russell*, 473 U.S. 134, 142 n.9 (1985), where the Court noted that ERISA plan beneficiaries may bring suits on behalf of the plan in a representative capacity. We have no quarrel with this proposition—so long as plaintiff otherwise meet the requirements for Article III standing. ERISA plans are organized in a variety of ways, and no doubt some would give participants a stake in a lawsuit against fiduciaries. *See, e.g., Kayes*, 51 F.3d at 145 (plaintiffs alleged that the plan fiduciary's selection of a financially troubled insurance company was a breach of fiduciary duty that caused annuity payments owed *to the plaintiffs* to be reduced to seventy percent of their previous level). In such case, plan beneficiaries can also sue on behalf of the plans, because they will have a concrete stake in the outcome of the proceedings. Such is not the case here.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Tommie Glanton, on behalf of ALCOA Prescription Drug Plan and all other similarly-situated plans, et al.;
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

Tara Mackner, on behalf of the Kmart Comprehensive Healthcare Plan
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

ORDER
(FILED NOV. 7, 2003)

Pending before the Court are Defendant AdvancePCS Health, L.P.'s Motion for Judgment on the Pleadings (Doc. 107-1), Motion to Dismiss Plaintiff Mackner's Complaint (Doc. 152-1), and Motion to Dismiss Plaintiff Glanton's Second Amended Complaint (doc. 154-1).[5] Defendant moves to Dismiss Plaintiffs' Complaints pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure

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[5] The same issues are presented in all three motions and complaints.

for lack of standing. Oral argument was held on July 27, 2003. The Court now grants Defendant's motions.

Plaintiff Tommie Glanton is an employee of ALCOA, Inc. and a member and beneficiary of the ALCOA Prescription Drug Plan. Plaintiff Tara Mackner was, but no longer is, a member and beneficiary of the K-Mart Comprehensive Healthcare Plan. Defendant is the pharmacy benefits manager ("PBM") for these plans ("Plans"). As PBM for the Plans, Defendant administers the prescription drug benefits available to Plaintiffs and other members and beneficiaries of the Plans. Defendant contracts with retail pharmacies and drug manufacturers to provide prescription drugs at a discounted rate for the benefit of the Plans. The Plans pay Defendant administrative fees for its services. Defendant also receives money from pharmaceutical companies in the form of rebates, discounts and other compensation when Plan participants use particular pharmaceutical drugs. Defendant does not pass this compensation or savings through to the Plan and does not disclose the nature or extent of its relations with retail pharmacies or manufacturers to the Plans or their beneficiaries.

In this consolidated action, Plaintiffs seek class action certification, purporting to represent all self-funded welfare benefit plans under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101-1462, that have retained Defendant as their PBM. Plaintiffs ask this Court to declare that Defendant is an ERISA fiduciary that has breached its duties to the Plans by engaging in practices benefiting Defendant at the expense of the Plans by engaging in practices benefiting Defendant at the expense of the Plans. They seek an accounting, restoration of funds to the plans, imposition of a constructive trust, and "any other general, equitable, or remedial relief the Court deems just and appropriate under the circumstances."

Defendant argues that Plaintiffs' Complaints must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiffs lack standing under Article III of the United States Constitution. They assert that Plaintiffs' Complaints fail to establish the elements required for constitutional standing because they allege injuries to the Plans, but not to the individual Plaintiffs. Defendant alternatively asserts that Plaintiffs' Complaints should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of statutory standing. Plaintiffs argue that ERISA §§ 409 and 502(a)(2),(3) vest them with procedural capacity and representational standing to sue on behalf of the Plans.

Standing cannot be inferred argumentatively from averments in the pleadings; it must affirmatively appear in the record. *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 231 (1990). The party who seeks the exercise of jurisdiction bears the burden of alleging facts demonstrating he is a proper party to seek judicial resolution of the dispute. *Id.* Standing is an indispensable part of the plaintiff's case, and each element must be supported with the manner and degree of evidence required at the successive stages of the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Warth*, 422 U.S. at 501. A complaint should not be dismissed unless it appears the movant could "prove no set of facts in support of his claim which would entitle him to relief." *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (applying standard to 12(b)(1) motion); *Parks School of Bus. V. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)(applying standard to 12(b)(6) motion).

"The irreducible constitutional minimum of standing" contains three elements. *Lujan*, 504 U.S. at 560-62. The plaintiff must have suffered "an injury in fact—an invasion of a legally protected interest which is concrete and

particularized and actual or imminent, no conjectural or hypothetical." *Id.* The injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* Finally, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." *Id.*

The Supreme Court has explained that "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights the invasion of which creates standing." *Warth*, 422 U.S. at 500 (citing *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *see also Vermont Agency of Natural Resources v. U.S. ex rel Stevens*, 529 U.S. 765, 773; *Fernandez v. Brock*, 840 F.2d 622, 629 (9th Cir. 1988). Courts considering whether standing exists in such cases must determine "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500-01; *Vermont Agency*, 529 U.S. at 772-73; *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556-558 (1996). *See also Fernandez*, 840 F.2d at 624 (applying concept in ERISA case); *Harley v. Minnesota Mining and Manufacturing Company*, 284 F.3d 901, 905 (8th Cir. 2002).

ERISA § 409 provides that a fiduciary of a plan may be held personally liable for breach of his duties, and is subject to equitable or remedial relief as the court deems appropriate. 29 U.S.C. §1109(a). A fiduciary may be required to make good to the plan any losses to the plan resulting from the breach and to restore to the plan any profits made through use of plan assets. *Id.* Sections 502(a)(2) and (3) authorize a civil action by a participant, beneficiary or fiduciary for appropriate relief under §409 or: "(A) to enjoin any act or practice which violates any provision of this sub-chapter or

the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this sub-chapter or the terms of the plan." 29 U.S.C. 1132(a)(2),(3).

In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 144 (1985), the United States Supreme Court held that a fiduciary of an employee benefit plan could not be held personally liable to a plan participant or beneficiary pursuant to ERISA § 409 for extra-contractual compensatory or punitive damages caused by improper or untimely processing of a benefit claim. The Court determined that recovery from a fiduciary for a violation of § 409 inures to the benefit of the plan as a whole, not to individual beneficiaries and participants. *Russell*, 473 U.S. at 140. The Court explained that the drafters of § 409 were "primarily concerned with the misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142. In determining that no private right of action for extra-contractual or punitive damages existed, the Court reasoned that careful integration of six civil enforcement provisions into 502(a) provided "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (*applying Cort v. Ash*, 422 U.S. 66, 78 (1975)).

Although the *Russell* Court determined that the relief available under § 409 was limited by the terms of §§ 409 and 502(a)(2), the Court noted § 502(a)(3) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409. *Russell*, 473 U.S. at 143-44. *See also Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1462 (9th Cir. 1995); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986). In *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), the Court held that § 502(1)(3), 29 U.S.C. 1132(a)(3), authorized a lawsuit by a beneficiary against the employer/plan administrator for

individual equitable relief for breach of fiduciary duty. *Id.* The Court observed that "appropriate" equitable relief may be available under §502(a)(3) where the remedy is consistent with ERISA and not otherwise adequately remedied by ERISA. *Id.*

The Ninth Circuit in *Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1409-19 (9th Cir. 1988), considered the availability of a constructive trust as a remedy under ERISA where suit is brought on behalf of all plan participants and beneficiaries against a plan fiduciary for mismanagement of plan assets. The Court held that a constructive trust could be imposed for the benefit of all plan participants and beneficiaries where return of funds to the plan would result in a return of the funds to a fiduciary who mishandled them. *Murdock*, 861 F.2d at 1416. The Court determined that the imposition of a constructive trust would be appropriate under the circumstances because the remedy sought was linked to the terms of ERISA. *Id.* The Court observed that *Russell* supported the imposition of a constructive trust in favor of plan participants and beneficiaries where it was established that the constructive trust was "the only available means of removing the ill-gotten profits from a culpable fiduciary's hands." *Id. See also Waller v. Blue Cross of California*, 32 F.3d 1337, 1339 (9th Cir. 1994)(although plan participants and beneficiaries had no standing to seek legal damages for breach of fiduciary duty, plaintiffs had "standing to sue on behalf of all participants and beneficiaries of the plan for a constructive trust remedy to strip a fiduciary of ill-gotten profits earned from breach of his fiduciary duties").

A plan participant or beneficiary has an interest in the plan being handled by loyal fiduciaries in accordance with ERISA. *Murdock*, 861 F.2d at 1416; *Waller*, 32 F.3d at 1339-40. It would be contrary to ERISA and the principles recognized by the Supreme Court and the Ninth Circuit to

hold that plan participants and beneficiaries must establish an individual denial of benefits or harm in addition to the harm identified by statute whenever they seek relief for breach of fiduciary duty under ERISA. ERISA sets forth procedures pursuant to which a plan participant or beneficiary may bring a civil action consistent with the statute when his or her rights are invaded by a breach of fiduciary duty, and identifies the relief available to remedy the invasion. ERISA §§ 409 and 502(a)(2),(3) can properly be understood as creating duties that, when breached, may result in an injury that in turn may support constitutional standing.

Notwithstanding this determination, Plaintiffs' Complaints must be dismissed because the Court is unpersuaded that the procedural rights created by ERISA in favor of plan participants and beneficiaries authorize Plaintiffs to bring a class action on behalf of the Plans under the circumstances of this case. Absent a procedural right to pursue the relief sought, standing cannot be found. *Russell*, 473 U.S. at 145; *Fernandez*, 840 F.2d at 630. In this case, Plaintiffs allege a breach of fiduciary duty by an entity that is not a named fiduciary of the Plans. Plaintiffs do not allege wrongdoing or failure to act by the named plan fiduciaries. Although the Ninth Circuit held in *Murdock* that a plan participant or beneficiary may seek the imposition of a constructive trust on behalf of all plan participants and beneficiaries, *Murdock* involved a *plan* fiduciary that allegedly breached his duties. The court reasoned the fiduciary's ill-gotten funds would cycle back to the fiduciary if a constructive trust were not imposed. Here, Plaintiffs allege that Defendant owes fiduciary duties under ERISA, but Defendant is not a named plan fiduciary.[6] Any funds

[6] The Court recognizes that an unnamed fiduciary may be charged with breaching a duty under ERISA, however, Plaintiffs have provided no basis for extending the reasoning of *Murdock* and *Waller* to the distinguishable circumstances of this case.

recovered by virtue of this lawsuit would not return to Defendant's hands. Instead, the funds would be managed and administered by the named plan fiduciaries, who are not charged with wrongdoing. This distinction is significant because in *Murdock*, the plaintiff was the most appropriate party to allege the statutory violation and because a constructive trust was necessary to protect the money recovered. In this case, there is no similar indication that Plaintiffs are the proper parties to sue on behalf of the Plans for a violation of an alleged fiduciary duty by an entity contracting with the Plans and no equivalent basis for imposing a constructive trust.

Plaintiffs suggest that they are proper parties to bring suit because ERISA grants them "representational standing" to sue for injury to their Plans in same way that representational standing is granted in the context of *qui tam* actions, actions by an executor on behalf of an estate, or by a parent or guardian ad litem on behalf of a child. "Representational standing" may be found to exist when one person or entity is legally authorized to sue on behalf of another. *See, e.g., Vermont Agency*, 529 U.S. 765-774; *United Food and Commercial Workers*, 517 U.S. at 558; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40-41 (1976); *Warth*, 422 U.S. at 511. However, unlike the executor in an estate action, a parent or guardian, or a realtor in a *qui tam* action, Plaintiffs are not statutorily designated as fiduciaries and are not assigned the legal responsibility to represent others. To the contrary, ERISA provides for named fiduciaries, whose legal responsibility is to act for the Plan. 29 USCA § 1102.

Moreover, even if the Court were to agree Plaintiffs were the proper parties to bring a class action against Defendant, the Court is unpersuaded that the remedy they

seek is appropriate under the circumstances. In *Bast v. Prudential Ins. Co. of America*, 150 F.3d 1103, 1011 (9th Cir. 1997), the Ninth Circuit determined a constructive trust did not "fit the mold" where it was alleged that the Defendant was unjustly enriched but did not take money from the Plan. *Id.* The Court distinguished *Murdock* and *Waller* where an identifiable portion of the beneficiaries' pension plans had been improperly taken. *Id.* In the present case, a constructive trust is sought to force Defendant to disgorge the amount of money it received from pharmaceutical companies through rebates and discounts. As in *Bast*, this case involves no "ill-gotten" profits that could be returned in the same sense as the money taken from the pension plans in *Murdock* and *Waller*, and does not involve assets held by the Plans.

IT IS ORDERED granting Defendant's Motion for Judgment on the Pleadings (Doc. 107-1) and dismissing Plaintiff Glanton's Restatement of Amended Complaint (Doc. 84-1);

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Glanton's Second Amended and Restated Complaint (Doc. 154-1) and dismissing Plaintiff Glanton's Second Amended and Restated Complaint (Doc. 147-1);

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Mackner's Complaint Doc. 152-1), and dismissing Plaintiff Mackner's Complaint (Case No CIV 03-0607-PHX-SRB, Doc. 1-1).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter Judgment in favor of Defendant, thereby terminating this case (Civ. 02-0507-PHX-SRB, designated before consolidation as CIV. No. 03-0607-PHX-SRB).

DATED this 5 day of November, 2003.

/s/
Susan R. Bolton
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Tommie Glanton, on behalf of ALCOA Prescription Drug Plan and all other similarly-situated plans, et al.;
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

Tara Mackner, on behalf of the Kmart Comprehensive Healthcare Plan
Plaintiff,
v.
Advance PCS Health, L.P.,
Defendant.

JUDGMENT IN A CIVIL CASE
(FILED NOV. 7, 2003)

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED granting Defendant's Motion for Judgment on the Pleadings [107-1] and dismissing Plaintiff Glanton's Restatement of Amended Complaint [84-1]

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Glanton's Second Amended and Restated Complaint [154-11] and dismissing Plaintiff Glanton's Second Amended and Restated Complaint [147-1].

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss Plaintiff Mackner's Complaint [152-1] and dismissing Plaintiff Mackner's Complaint (Case No. CIV 03-0607-PHX-SRB [1-1]).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter Judgment in favor of Defendant, thereby terminating this case (CIV 02-05-70PHX-SRB, designated before consolidation as CIV 03-0607-PHX-SRB). This complaint and action are hereby dismissed.

November 7, 2003
Date

RICHARD H. WEARE
District Court Executive/Clerk

Signature

(By) Deputy Clerk

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15328

TOMMIE GLANTON, on behalf of the ALCOA Prescription Drug Plan and other similarly-situated plans, et al.; TARA MACKNER, on behalf of the Kmart Comprehensive Health Plan
Plaintiffs – Appellants,
v.
ADVANCEPCS INC,
Defendant - Appellee

ORDER
(FILED JAN. 8, 2007)

Before: KOZINSKI and FERNANDEZ, Circuit Judges, and HATTER, District Judge

Appellant's petition for rehearing and petition for rehearing en banc, and appellee's motion to amend the opinion are denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMMIE GLANTON, on behalf of the ALCOA Prescription Drug Plan and other similarly-situated plans, and
TARA MACKNER, on behalf of the Kmart Comprehensive Health Plan
Plaintiffs/Appellants
v.
ADVANCEPCS HEALTH, L.P.
Defendant/Appellee

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REQUESTING REVERSAL

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TIMOTHY D. HAUSER
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STATEMENT OF INTEREST

The Secretary of the United States Department of Labor has primary enforcement authority for Title I of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq. The Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir.1986) (en banc).

The issues in this case are: (1) whether ERISA authorizes plan participants and beneficiaries to bring an action for a fiduciary breach under section 502(a)(2) and (a)(3) against a defendant that is not a "named plan fiduciary" with respect to the ERISA covered plan, but that allegedly is a functional fiduciary under ERISA; (2) whether the participants have constitutional standing to bring such a suit where they have not personally suffered an injury in fact; and (3) whether they must establish their right to equitable remedies in order to maintain such a suit. The Secretary has a significant interest in these issues, both as a general matter in order to ensure that ERISA section 502(a)(2) and (a)(3) are interpreted broadly to protect participants, beneficiaries and/or fiduciaries who uncover and attempt to remedy

statutory violations, and more specifically to protect her own enforcement role under section 502.

* * * * *

SUMMARY OF THE ARGUMENT

The district court erred in holding that the Plaintiffs lacked standing to bring their suit on behalf of the Plans. There is no question that participants and beneficiaries have statutory standing under section 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(2) and (a)(3), to bring an action on behalf of a plan for a fiduciary breach, See Waller v. Blue Cross of California, 32 F.3d at 1339; Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d at 1409. Moreover, courts, including the Ninth Circuit have long recognized that ERISA provides a functional, as well as a formal definition of fiduciary, and thereby allows plaintiffs to sue not only those who are named fiduciaries, but also anyone who acts in a fiduciary capacity. See Acosta v. Pac. Enters., 950 F.2d 611, 618 (9th Cir. 1991) ("a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"). The district court simply misconstrued the statute and the governing case law on these points.

Furthermore, since the Appellants are statutorily authorized to bring an action on behalf of their Plans against a functional fiduciary for breach of duty, it is immaterial whether Appellants themselves suffered an injury in fact. Any alleged losses are recovered by the Plans, which have allegedly been injured by fiduciary breaches. This is enough to establish standing for Article III purposes.

I. Participants and beneficiaries are authorized under Section 502(a)(2) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(2) and (a)(3), to bring an action on behalf of their plans against a functional fiduciary for breach of duty

ERISA section 502 (a)(2), the second of ERISA's "six carefully integrated civil enforcement provisions," Russell, 473 U.S. at 146, expressly authorizes a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [409] of this title." 29 U.S.C. § 1132(a)(2). Section 409(a), 29 U.S.C. § 1109(a), in turn, makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: the fiduciary is personally liable for damages ("to make good to [the] plan any losses to the plan resulting form each such breach"), for restitution ("to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate," including removal of the fiduciary. As the Supreme Court in Russell put it "[t]here can be no disagreement with the Court of Appeals' conclusion that § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409." 473 U.S. at 140. Nor can there be any disagreement that section 502(a)(3), by its terms, authorizes a cause of action for "appropriate equitable relief" by "a participant, beneficiary or fiduciary." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209-10 (2002); Mertens v. Hewitt Assocs., 508 U.S. 248, 253-55 (1993). Thus, the district court erred to the extent it concluded that only plan fiduciaries and not participants and beneficiaries are

"assigned the legal responsibility to sue others." Order, p. 7, [Record Excerpt, p. 156].[7]

More fundamentally, the court erred in dismissing the Complaint merely because the Appellants were suing an entity that is not a named fiduciary of the Plans. Under ERISA, a "named fiduciary" is "a fiduciary who is named in the plan instrument, or who . . . is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly." 29 U.S.C. § 1102(a). ERISA, however, "provides that not only the persons named as fiduciaries by a benefit plan, see 29 U.S.C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see § 1102(21)(A), is an ERISA 'fiduciary'" Mertens, 508 U.S. at 251.

* * * * *

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[7] There are cases that hold that participants are not entitled to sue an employer for contributions unless they first establish that the plan trustees breached their fiduciary duties by failing to sue the employer. See Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984); Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912 (2d Cir. 1989). Section 502(g)(2) of ERISA, 29 U.S.C. § 1132 (g)(2), provides plan fiduciaries with remedies to enforce employer plan contribution obligations pursuant to section 515, 29 U.S.C. § 1145, but does not authorize such suits by plan participants. Thus, a participant may not bring a derivative action against the employer unless the trustees have failed to bring such a suit. See A. Scott, 4 Law of Trusts § 282.1 (3d ed. 1967) ("if the trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit in equity against the trustee joining the obligor as a co-defendant"). Moreover, the delinquent contribution cases all involve participant actions against non-fiduciaries. Because the participants here are directly suing a fiduciary for fiduciary breaches, neither Struble nor Diduck support the district court's holding.

II. Participants and beneficiaries who sue under section 502(a)(2) and (a)(3) have standing to sue on behalf of their plans and thus need not show that they personally have suffered injury in fact.

It is not enough that Appellants have a statutory cause of action. They must also, of course, establish Article III standing, the requirements of which are injury in fact, causation and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Advance argues that Appellants have failed to establish injury in fact because they cannot show that they personally have been injured by any arrangements that Advance may have had with pharmaceutical companies. They note that the primary harm alleged is to the Plans and not directly to the participants and beneficiaries, and any increased costs (or conversely savings) would not necessarily be passed on to the participants and beneficiaries. However, "[t]he actual or threatened injury required by Article III may exist solely by virtue of statues requiring legal rights, the invasion of which creates standing." RJR Cab, Inc. v. Hodel, 797 F.2d 111, 118 (3d Cir. 1986) (quoting Warth v. Selden, 422 U.S. at 499-500. Thus, where, as here, an entity is alleged to have violated its statutory duties as a fiduciary to ERISA plans, that violation creates standing in those (such as the participants) who are authorized to sue to enforce those duties. See Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., with whom Blackmun and Powell, J.J., join, concurring) (statute conferred standing that would have been doubtful under Article III in the absence of the statute).

Similarly, the Supreme Court has recognized that a statute may create representational standing, whereby the statutorily-designated party sues to redress an injury suffered by another. Thus, in a False Claims Act case brought by a private party (a "qui tam relator"), who personally suffered

"no…invasion" of any "legally protected right," the Supreme Court held "that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 773 (2000).

More specially, in the ERISA context, the Supreme Court has expressly recognized that:

> § 502(a)(2), the enforcement provision for § 409 authorizes suit by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and Fiduciaries. Inclusion of the Secretary of Labor is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes is the financial integrity of the plan.

Russell, 473 U.S. at 142 n.9. Thus, Russell clarified that the enumerated parties are authorized by ERISA to bring suit on behalf of the plan, and each is statutorily empowered with representational standing to do so. See Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 n.7 (3d Cir. 1990) (sections 409 and 502(a)(2) only allow "individual participants to sue 'in a representative capacity on behalf of the plan'"). There is no need to show that the party authorized to sue personally has suffered an injury in fact. Rather, the party need only show that the plan may be entitled to relief.[8]

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[8] Because, as we argue in text, the plaintiffs have representational standing under section 502 to sue to redress the alleged injures to the Plans, they meet the causation and redressability prongs of Article III standing as well. Plaintiffs' claim that the disloyal actions by Advance

Indeed, in holding that ERISA does not permit claims for compensatory damages (which it termed "extra contractual") or for punitive damages, the Supreme Court reasoned that those who sue under section 502(a)(2) may do so only to recover for an injury to the plan. Russell, 473 U.S. at 148; accord In re Occidental Petroleum Corp., 217 F.3d 293, 297 n.14 (5th Cir.2000); Adamson v. Armco, Inc., 44 F.3d 650, 654 (8th Cir. 1995); Lee v. Burkhart, 991 F.2d 1004 (2d Cir. 1993); Hozier, 908 F.2d at 1162 & n.7; Bryant v. Int'l Fruit Prod. Co., 886 F.2d 132, 135 (6th Cir. 1989) (per curiam); Drinkwater v. Metro. Life Ins. Co., 846 F.2d 821, 824 (1st Cir. 1988); Sokol v. Berbstein, 803 F.2d 532, 537 (9th Cir. 1986). Given that section 502(a)(2) therefore does not encompass claims for individual relief at all, courts following Russell have denied recovery to participants and beneficiaries suing for relief under this provision. See, Hozier, 908 F.2d at 1162 n.7 (claim to recover individual benefits not authorize under sections 409 and 502(a)(2) because these provisions only allow "individual participants to sue 'in a representative capacity on behalf of the plan'"); Carr v. Malcolm & Riley, P.C., No. 90-6407, 1991 WL 67749, at *8 (E.D. Pa. Apr. 25, 1991) (same). It would be irrational, indeed, to conclude that participants must show individual harm in order to have standing to sue under section 502(a)(2), but that they cannot individually recover for that harm under that very provision.[9]

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injured the Plans, and injunctive or monetary relief could conceivably remedy that injury. Again, the focus of inquiry is on the Plans.

[9] Although section 502(a)(3) does allow claims for individual relief, as the Supreme Court held in Varity Corp. v. Howe, 516 U.S. 489, 515 (1996), there is little question that it too allows actions for "appropriate equitable relief" running to the plan. Indeed, the Supreme court granted certiorari in Varity to resolve the split in the lower courts as to whether the relief available under section 502(a)(3), like that available under section 502(a)(2), is limited to relief to the plan. Id. at 495. In holding that it is not so limited, the court in no way questioned that participants

Advance, however, relies upon the Eighth Circuit's holding in Harley v. Minnesota Mining & Mfg. Co., 284 F.3d 901, 906-07 (8th Cir. 2002), cert. denied, 537 U.S. 1106 (2003) that the participants and beneficiaries in that case lacked standing to bring fiduciary breach claims following an investment loss of close to $20 million to their defined benefit plan. The court there reasoned that the participants and beneficiaries were unable to show that they had suffered any harm from this loss because, under a defined benefit plan, the employer must cover any under-funding, and because, in this particular case, the employer (who was one of the parties being sued) had infused the plan with sufficient funds to create a sizable surplus. Id. at 903-04.

This Court should not apply the reasoning of Harley to this case for two reasons. First, Harley itself limits its holding to the "unique circumstances" of a suit against an over-funded defined benefit plan. Harley, 284 F.3d at 905. Second, and more fundamentally, the decision is simply wrong and cannot be squared with the statute or with the Supreme Court's reading of it in Russell, as we discuss above.[10]

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and beneficiaries may bring suit under section 502(a)(2) for equitable relief to remedy injuries to their plans, and many cases have allowed such suits without comment. See Wald v. Southwestern Bell Corp. Customcare Med.Plan, 83 F.3d 1002 (9th Cir. 1996).

[10] Nor is this Court's decision in Fernandez v. Brock, 840 F. 2d 622, 628 (9th Cir. 1988), to the contrary. In Fernandez, migrant farmworkers brought an action against the Secretary of the Treasury alleging that they had been harmed by the government's failure to promulgate regulations governing participation, accrual and vesting thresholds for pensions for seasonal workers. The farmworkers alleged that they might be able to obtain pension benefits if new regulations were issued that lowered the minimum hours-per-year-worked standard for participants in plans. This Court concluded that the farmworkers were required to satisfy the injury-in fact requirement of Article III. Fernandez and the cases that it cites, however, all involved actions against government officials for failure to perform a statutory duty when the statute did not expressly provide for an

We note that in the present case, however, the participants and beneficiaries may well show that they have or will likely suffer an injury in fact. The participants and beneficiaries in the Alcoa Plan are subject to a co-payment. Also, they are restricted to the use of certain formularies. If the rebates and discounts are returned to the Plans, it is possible that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and possibly a more comprehensive benefit structure. Although the Plans' sponsors may take any recovered rebates and discounts and use these funds at their own disposal, this does not foreclose the possibility that the Appellants may benefit directly from a judgment in their favor.

* * * * *

CONCLUSION

For the reasons set forth above, the Secretary requests that this Court reverse the district court's decision and conclude that participants and beneficiaries may bring an action on behalf of the plan against a functional fiduciary under ERISA section 502(a)(2) and (a)(3) for appropriate equitable relief.

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action against the government. The question in those cases was whether the invasion of a statutory right can create a sufficient injury for Article III purposes, but was simply "whether a statute that imposes statutory duties [implicitly] creates correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III." Id. at 630. Here, the statute expressly provides that a participant may sue individually or on behalf of his plan to redress fiduciary violations. There is no need, therefore, to go beyond the statutory language to determine whether a participant must show individual injury in order to bring suit.

Respectfully submitted.

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Dated: JULY 1, 2004

APPENDIX F

1. 29 U.S.C. § 1002 provides in relevant part:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,

(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or

(B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

2. 29 U.S.C. § 1003 provides in relevant part:

§ 1003. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees * * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) of subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of title 26 (as in effect on October 22, 2004), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

3. 29 U.S.C. § 1004(a)(1)(A) provides:

§ 1004. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1003(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.

4. 29 U.S.C. § 1009(a) provides:

§ 1009. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. A fiduciary may also be removed for a violation of section 1111 of this title.

5. 29 U.S.C. § 1132 provides in relevant part:

§ 1032. Civil enforcement

(a) Persons empowered to bring a civil action
A civil action may be brought –

* * * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

CORRECTED COPY

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No. 06-1608

Supreme Court, U.S.
FILED
AUG 6 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TOMMIE GLANTON, ON BEHALF OF THE ALCOA PRESCRIPTION DRUG PLAN, AND ALL OTHER SIMILARLY-SITUATED PLANS, AND TARA MACKNER, ON BEHALF OF THE KMART COMPREHENSIVE HEALTH PLAN,

Petitioners,

v.

ADVANCEPCS HEALTH, L.P.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT ADVANCEPCS HEALTH, L.P. IN OPPOSITION

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QUESTION PRESENTED

Whether a participant in a plan covered by the Employee Retirement Income Security Act ("ERISA") has standing under Article III to litigate claims for breach of fiduciary duty under ERISA's civil enforcement scheme where he has not suffered a judicially cognizable injury to himself, much less, an injury likely to be redressed by a favorable outcome in the case.

RULE 29.6 STATEMENT

AdvancePCS Health, L.P., now known as CaremarkPCS Health, L.P. ("Caremark"), is a wholly owned indirect subsidiary of CaremarkPCS, which is a wholly owned subsidiary of Caremark Rx, LLC ("Caremark Rx"). Caremark Rx is a wholly owned subsidiary of CVS Caremark Corporation ("CVS Caremark"), which does not have any parent corporations. No publicly held company owns 10 percent or more of CVS Caremark's stock.

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IN THE

Supreme Court of the United States

No. 06-1608

TOMMIE GLANTON, ON BEHALF OF THE ALCOA PRESCRIPTION DRUG PLAN, AND ALL OTHER SIMILARLY-SITUATED PLANS, AND TARA MACKNER, ON BEHALF OF THE KMART COMPREHENSIVE HEALTH PLAN,

Petitioners,

v.

ADVANCEPCS HEALTH, L.P.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT ADVANCEPCS HEALTH, L.P. IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are set forth in the petition. Pet. at 1. However, 28 U.S.C. § 2403(a) (2000) is inapplicable because the decision below does not draw into question the constitutionality of an Act of Congress. Service of the petition upon the United States Solicitor General was therefore unnecessary.

COUNTER STATEMENT OF THE CASE

1. Respondent AdvancePCS is a pharmaceutical benefits management company ("PBM"). PBMs administer prescription drug benefit programs for their clients. In addition to basic claims processing, they, among other things, seek to reduce their customers' drug costs by pooling claims and negotiating volume rebates or discounts with pharmaceutical companies. Pet., App. A at 2a. Their clients are *not* consumers but rather are insurance companies, Health Maintenance Organizations, employer plan sponsors, and, in some cases, employee benefit plans themselves.

In this case, AdvancePCS contracted with two employers, Kmart and ALCOA, to provide pharmacy benefits management services. Both sponsor employee welfare benefit plans that provide medical and other benefits to eligible employees. Petitioner Tara Mackner ceased to be a participant in the Kmart health benefit plan shortly after this suit was filed. Petitioner Tommie Glanton was a participant in the ALCOA Prescription Drug Plan at the time of the decisions below. Both plans are subject to ERISA, and, as permitted by ERISA, are funded from the employer's general assets rather than a separate trust fund.

2. ERISA governs the administration of pension and welfare benefit plans established by employers for their employees. 29 U.S.C. § 1001(a) (2000). "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (ERISA permits the voluntary establishment of plans on whatever terms are chosen by plan sponsors).

This freedom is particularly expansive in the case of employee welfare benefit plans such as those involved in this

case. ERISA defines an "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care or benefits . . . ." 29 U.S.C. § 1002(1) (2000). While ERISA requires welfare benefit plans to comply with federal standards governing reporting, disclosure and fiduciary responsibilities, 29 U.S.C. §§ 1021-1030, 1101-1114 (2000), it does not prescribe, or otherwise regulate, substantive plan terms.[1] *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 514 (1997).

Employers thus have "large leeway to design . . . welfare plans as they see fit." *Black & Decker Disability Plan*, 538 U.S. at 833. As a result, they have discretion to determine those who will be eligible to participate in their plans, the kinds of medical services that will be covered, and the amounts that employees must contribute to the costs of their health care through payroll contributions, co-payments and deductibles.

3. The civil enforcement provisions of ERISA are set forth in Section 502, 29 U.S.C. § 1132 (2000). Subsection (a) of Section 502 (entitled "Persons empowered to bring a civil action") identifies nine causes of action that may be brought by various specified persons. In this case, petitioners filed their actions under Sections 502(a)(2) and (a)(3).

Section 502(a)(2) authorizes an action by the Secretary, or by a plan participant, beneficiary or fiduciary for appropriate relief under Section 409 of the Act. 29 U.S.C. § 1132(a)(2). Section 409 (entitled "Liability for breach of fiduciary duty") in turn provides relief to an employee benefit plan itself for fiduciary breaches that occur in the management of plan

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[1] Indeed, ERISA expressly exempts such plans from its vesting, participation and funding provisions. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

assets. 29 U.S.C. § 1109(a). As this Court has made clear, Section 502(a)(2) authorizes only "plan-related" relief and does not authorize relief to an individual beneficiary. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985).

Section 502(a)(3) is a "catchall" relief provision that "act[s] as a safety net" for "injured" plan participants. *Varity Corp. v. Howe*, 516 U.S. 489, 512-13 (1996). Section 502(a)(3) authorizes a suit by "a participant, beneficiary, or fiduciary" to obtain "appropriate equitable relief" to redress "any act or practice which violates any provision of this subchapter." 29 U.S.C. § 1132(a)(3). The referenced "subchapter" is Subchapter I of Chapter 18 of Title 29, which includes ERISA's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1112. When a breach of that duty causes distinct harm to individual participants or beneficiaries, the breach is "appropriate[ly]" subject, under Section 502(a)(3), to suit by the injured individuals, but only for equitable relief. *See Varity Corp.*, 516 U.S. at 515.

4. Petitioners filed separate actions in federal district court under Sections 502(a)(2) and (a)(3). Both sued "on behalf of" their respective plans. The district court consolidated the two cases. Pet., App. B at 10a-11a.

Petitioners alleged that respondent AdvancePCS is a fiduciary under ERISA.[2] Pet., App. A at 3a; App. B at 10a. According to the complaints, AdvancePCS allegedly engaged in hidden profit-making transactions falling into two general

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[2] The Seventh Circuit ruled to the contrary in *Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 476-77 (7th Cir. 2007), holding that AdvancePCS's successor did not act as an ERISA fiduciary in providing PBM services to an ERISA-covered health benefit plan. *See also Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 301 (1st Cir. 2005) (PBMs are not ERISA fiduciaries because they lack discretionary authority or control over plan administration), *cert. denied* 126 S. Ct. 2360 (2006).

categories at the expense of the benefit programs it served: (1) receiving rebates and other compensation from drug manufacturers that AdvancePCS, to a large extent, keeps without disclosing to the plans; and (2) pocketing "secret[] . . . spread[s]" between actual drug costs and the prices charged to plans and their members, in both retail and mail-order operations. Pet., App. A at 2a; App. B at 10a. Maintaining that these practices increased the cost of prescription drugs for the benefit programs involved, petitioners sought recovery of losses, disgorgement of profits, injunctive and other equitable relief.

Significantly, petitioners did not allege that they were denied benefits or that they received inferior drugs. Pet., App. A at 4a. Nor were they joined as plaintiffs by the "financial victims" of AdvancePCS's alleged wrongdoing who have a direct and immediate interest in the outcome of this case—the employer plan sponsors who financed the employee benefit programs involved and bore the expense of the alleged increased benefit costs. Rather, petitioners alleged that they had standing under ERISA to sue "on behalf of" the plans "irrespective" of whether they themselves "suffered a loss or injury." They later alleged in an amended complaint that, if their suit was successful, the plans' drug costs would decrease, and participant contributions or co-payments might be reduced. Pet., App. A at 4a.

AdvancePCS moved to dismiss the complaints pursuant to Fed. R. Civ. P. 12(b)(1) for lack of Article III standing. AdvancePCS argued that the complaints relied on an alleged injury to the plans rather than to petitioners individually. Moreover, petitioners had no assurance that they would benefit personally from any relief awarded in the lawsuit because the plan sponsor had no obligation to reduce petitioners' contributions or co-payments as a result of any recovery by the plan. Instead, the plan sponsor could simply stop using

its general assets to pay benefits until any recovery was exhausted.

At oral argument on the motion to dismiss, petitioners effectively conceded that their claims of personal injury were sheer speculation. Specifically, petitioners' counsel admitted that they did not know whether ALCOA or Kmart, who were not parties to this litigation, would reduce employee contributions or co-payments if the requested relief were awarded: "Your Honor, we don't know what the fiduciaries are going to do with the money." Supplemental Excerpts of Record ("SER") 56.

The district court dismissed the complaints with prejudice for failure to establish Article III standing. The court rejected petitioners' argument that Congress can create Article III standing simply by granting a procedural right to a private party. Pet., App. B at 11a-15a. Moreover, even if an uninjured participant might have Article III standing in *some* situations to sue on a plan's behalf under ERISA, the court concluded that petitioners lacked such standing "under the circumstances of this case." Pet., App. B at 15a. The petitioners here not only suffered no injury, but also did "not allege wrongdoing or failure to act by the named plan fiduciaries," the parties with statutory responsibility for protecting the plan's interest. Pet., App. B at 15a-16a.

The court also rejected petitioners' suggestion that Article III should be deemed satisfied under a "representational standing" theory, emphasizing that petitioners "are not statutorily designated as fiduciaries and are not assigned the legal responsibility to represent others." Pet., App. B at 16a. Rather, the legal duty to represent all of a plan's participants and beneficiaries is assigned by ERISA Section 402 to the plan's named fiduciaries. *Id.*

5. The court of appeals affirmed in an unanimous decision authored by Judge Kozinski. Pet., App. A at 1a-8a.

First, the court ruled that petitioners had not shown the type of redressable injury to themselves that would satisfy the traditional standing requirements outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Pet., App. A at 3a-4a. The court rejected petitioners' argument that their only asserted injury—having to pay higher co-payments and contributions—would be redressed by a favorable decision. Pet., App. A at 4a. Nothing would require ALCOA or Kmart to reduce participant co-payments or contributions. *Id.* Even if monetary relief were awarded to the plans to reimburse them for past overpayments in covering prescription drug costs, "ALCOA or K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted." *Id.* Under these circumstances, the court found that there was no redressability because "any prospective benefits depend on an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

The court then turned to petitioners' alternative argument that they have standing as "congressionally authorized representatives of the injured plans." Pet., App. A at 3a. The court rejected petitioners' attempt to draw an analogy to *qui tam* actions under the False Claims Act ("FCA"), which this Court upheld against an Article III standing challenge in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Pet., App. A at 4a-5a. Unlike *qui tam* actions, which have existed for centuries, "there is no similar tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans." Pet., App. A at 5. Moreover, the FCA "assigns relators a concrete stake in *qui tam* cases by giving them a piece of the action," whereas any recovery under ERISA would be paid to the plans, not petitioners. *Id.*

The court also rejected petitioners' contention that their ERISA suit is similar to other "representative damages litiga-

tion," such as Rule 23(b)(3) class actions, suits by trustees representing creditors in bankruptcy, *parens patriae* actions by state governments, and suits by and against executors. Pet., App. A at 6a. None of these examples was particularly relevant, the court explained, "because in each the plaintiff has a direct stake in the outcome of the litigation." *Id.* The court also distinguished "associational standing" cases, noting that the theory of those cases—that by joining the association, an individual member authorizes the association to represent the member's interests—"does not operate in reverse." Pet., App. A at 8a. "Thus, a health plan might be able to sue on behalf of its injured subscribers even if the plan suffered no injury, but not vice versa." *Id.*

Finally, the court indicated that it had "no quarrel" with the proposition that ERISA plan beneficiaries may sue in a representative capacity on their plan's behalf, as long as the beneficiary "otherwise meets the requirements for Article III standing." Pet., App. A at 8a. In this case, however, the petitioners had no "concrete stake in the outcome of the proceedings," and therefore lacked Article III standing. *Id.*

REASONS FOR DENYING THE PETITION

Recognizing the absence of any circuit conflict, petitioners attempt to depict the unanimous decision below as one that "invalidates a federal statute" or "declar[es] a statute unconstitutional." Pet. at 10-11. But the decision below cannot be so characterized—nowhere does it invalidate Section 502(a) of ERISA or hold that any portion of the statute is unconstitutional. Rather, consistent with every other court of appeals that has addressed the issue, the court below held simply that Section 502(a) does not abrogate traditional Article III standing requirements. Pet., App. A at 3a ("Plaintiffs, nevertheless, cannot proceed unless they have Article III standing."). The decision itself turns on petitioners' inability to demonstrate the type of redressable injury to themselves that

would satisfy Article III. Pet., App. A at 4a. It does not conflict with the decisions of this Court, and otherwise raises no issue warranting this Court's review.

I. Petitioners Have Mischaracterized the Decision Below and Overstated Its Implications.

1. Petitioners' contention that the court of appeals has "invalidat[ed]" or "struck down" Section 502(a) of ERISA and "[made] the substantive provisions of ERISA effectively unenforceable" both mischaracterizes the decision below and overstates its implications. Pet. at 13, 26; *see also* Pet. at 10, 13, 14, 15, 17, 21-22, 30. The court did not hold that any portion of Section 502(a) "violates Article III of the United States Constitution." Pet. at i; *see also id.* at 9, 10, 12, 13, 30. On the contrary, the Ninth Circuit held simply that petitioners failed to demonstrate the type of redressable injury to themselves that would satisfy Article III standing requirements under the circumstances of this case.

As this Court's prior decisions make clear, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *id.* at 830 n.1 (Souter, J., concurring); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself . . . .") (internal quotation marks and citation omitted); *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Courts no more have the power to disregard the injury-in-fact standard at Congress' directive than they do on their own initiative: "Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement . . ., they would be discarding a principle fun-

damental to the separate and distinct constitutional role of the Third Branch . . . ." *Lujan*, 504 U.S. at 576.

Consistent with this Court's precedents, petitioners were required to establish "a likelihood that the injury they have suffered will be redressed by a favorable outcome to the litigation." Pet., App. A at 3a-4a (citing *Lujan*, 504 U.S. at 560-62); *see also Raines*, 521 U.S. at 818 ("'plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief'") (citation omitted). Petitioners' *only* claimed injury is that they had to pay higher co-payments and contributions because "AdvancePCS charged the plans too much for drugs." Pet., App. A at 4a. The court below found that this alleged injury is not "redressable" because any benefit from a favorable decision depends on "an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Id.* (quoting *ASARCO*, 490 U.S. at 615).

Although petitioners argued that a favorable decision might reduce prescription drug costs, they failed to establish any likelihood that such cost reduction would be passed through to participants in the form of reduced co-payments or contributions. Nor could they. As the Ninth Circuit pointed out, "nothing would force ALCOA or K-Mart to do this." Pet., App. A at 4a. Rather "ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted." Pet., App. A at 4a. Indeed, the Department of Labor conceded as much in the *amicus* brief that features prominently throughout the petition. Pet., App. E at 31a ("the Plans' sponsors may take any recovered rebates and discounts and use these funds at their own disposal"). Not surprisingly then, Petitioners *nowhere* argue that the "injuries" they allegedly suffered

would be necessarily redressed by a favorable disposition of this case.[3]

Thus, Judge Kozinski's decision below simply does not present the question concerning "the constitutional validity of section 502(a)" that petitioners would have this Court address. Pet. at 11. Indeed, the court of appeals had "no quarrel" with the proposition that a participant may sue on the plan's behalf under Section 502(a), as long as the participant meets Article III standing requirements. Pet., App. A at 8a; *see also* App. A at 3a-4a. The court's fact-specific determination that the petitioners here failed to meet Article III standing requirements does not warrant this Court's review.

2. Contrary to petitioners' contention (Pet. at 13-17), the decision below raises no enforcement concern in this or any other case. Far from "invalidat[ing] participant and beneficiary standing under Section 502(a)" (Pet. at 14), the Ninth Circuit simply determined that petitioners had no "concrete stake in the outcome" under the circumstances of this case. Pet., App. A at 8a. The fact-specific nature of that determination is reinforced by the court's recognition that "ERISA plans are organized in a variety of ways, and no doubt some would give participants a stake in a lawsuit against fiduciaries." *Id.*[4] Moreover, as the court emphasized at the outset,

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[3] Petitioner Mackner lacks Article III standing for the additional reason that she is no longer a participant in the Kmart Plan and thus could not possibly benefit from any recovery awarded to the Plan. As the district judge stated at oral argument: "[Mackner] wouldn't be the one that, if I were a part of the K-Mart Comprehensive Healthcare Plan, that I would want representing me as a participant in this lawsuit." SER 58.

[4] *See, e.g., Graden v. Conexant Sys., Inc.*, No. 06-2337, 2007 U.S. App. LEXIS 18179, at *5-6 (3d Cir. July 31, 2007) (cashed-out former employee had both Article III standing and statutory standing to bring an action against the administrator of his former employer's 401(k) plan under ERISA § 502(a)(2) seeking to recover losses on employer stock holdings that reduced the value of his individual account).

petitioners here "don't claim they were denied benefits or received inferior drugs." Pet., App. A at 4a.

Petitioners' related contention (Pet. at 14 n.30) that plan fiduciaries "are likely to lack incentive" to take any legal action on the plan's behalf turns the reality of this case on its head. Unlike petitioners, the plan fiduciaries who retained AdvancePCS to provide services to the plans, ALCOA and Kmart, have a duty under Sections 404(a)(1) and 405(c)(2) of ERISA to monitor AdvancePCS's performance of those services.[5] To the extent AdvancePCS may have engaged in any improper transactions, ALCOA and Kmart have a fiduciary responsibility to call AdvancePCS to account in a breach of contract or Section 502(a) action. Moreover, because of their fiduciary duty to monitor AdvancePCS's performance, ALCOA and Kmart have a direct and palpable interest in the outcome. *See* Pet., App. A at 6a-7a ("Trustees and executors . . . have a stake in the litigation because they are acting on behalf of the estate, which owns the claims being litigated."). Indeed, as the employer plan sponsors who finance the benefit plans in question, ALCOA and Kmart have a direct financial interest in challenging any alleged wrongdoing by AdvancePCS that increases benefit costs. That ALCOA and Kmart have taken no such action against AdvancePCS indicates that they have no substantial concern with its performance.

In addition to the plan's fiduciaries, the Secretary of Labor has authority to bring suit under Sections 502(a)(2) and (a)(5) of ERISA,[6] without the restrictions applied to private parties.

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[5] 29 U.S.C. §§ 1104(a) & 1105(c)(2); *see also* 29 C.F.R. § 2509.75-8, Q-FR-14 & Q-FR-17 (2003); 29 C.F.R. § 2509.96-1(e) (2003).

[6] 29 U.S.C. §§ 1132(a)(2) & (a)(5). Petitioners' argument (Pet. at 15) that the Secretary is not permitted to bring actions under Section 502(a)(3) ignores the Secretary's separate authority under Section 502(a)(5) to bring an action "(A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress

Petitioners' suggestion that the Secretary would lack Article III standing under the court of appeals' analysis (Pet. at 15) is misplaced. The government has a *prima facie* interest in enforcing its own laws. *See Vermont Agency*, 529 U.S. at 771 ("It is beyond doubt that the complaint asserts an injury to the United States . . . the injury to its sovereignty arising from violation of its laws . . . ."). As the court below observed, States have standing in *parens patriae* actions because they have a similar "concrete stake in the proper application of the laws of their jurisdiction." Pet., App. A at 7a (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).

Hence, if a rare situation were to arise where plaintiffs suffered no personal injury, but the Department of Labor believed the conduct of a fiduciary sufficiently serious or troubling, the Secretary could elect to bring suit. While the Secretary's enforcement resources are limited, so are the resources of the federal courts. How the Secretary's resources are allocated for various enforcement ends is a matter decided by Congress and the Executive Branch officials assigned to make those policy decisions. There is no evidence that Congress in ERISA prescribed a proliferation of suits by uninjured participants for alleged fiduciary violations that federal regulators—like the plan's fiduciaries—deemed unworthy of their own action.

II. The Decision Below Is Consistent With, and Does Not Conflict With the Decisions of Other Courts of Appeals.

The Ninth Circuit's holding that petitioners could not proceed without Article III standing is consistent with the decisions of every other court of appeals that has addressed the issue. In addition to the Ninth Circuit, three other circuit

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such violation or (ii) to enforce any provision of this title." 29 U.S.C. § 1132(a)(5).

courts have ruled squarely that Section 502(a) does not permit plan participants to seek relief only for others (or based on the injuries of others) when they themselves have not suffered a concrete injury that is capable of redress. *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care*, 433 F.3d 181 (2d Cir. 2005); *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450 (3d Cir. 2003); *Harley v. 3M*, 284 F.3d 901 (8th Cir. 2002).

In *Central States*, participants brought a class action against Medco Health Solutions, a PBM, for allegedly violating fiduciary duties to ERISA plans by promoting drugs made by its parent company and diverting rebates from other manufacturers to itself. 433 F.3d at 187. One issue on appeal was whether the participants had Article III standing to litigate the claims on behalf of the plans. *Id.* at 185. The participants "premised their assertion on statutory standing under ERISA," but the Second Circuit found this was not sufficient to confer jurisdiction. *Id.* at 201. "[S]tatutory standing will not suffice to substitute for Article III standing." *Id.* The Second Circuit found that the record was unclear as to "whether the Plaintiffs have demonstrated the requisite injury-in-fact for supporting a finding of constitutional standing," and therefore remanded the case for the district court to rule in the first instance. *Id.* at 200.

In *Horvath*, a welfare plan participant sought restitution and disgorgement of alleged excessive premiums paid by her employer for plan coverage as a result of the fiduciary's failure to disclose information about physician incentives adversely impacting quality of care. 333 F.3d at 452. The Third Circuit found that while the participant had statutory standing, she lacked Article III standing because she did not allege that she was personally affected by the alleged breach. *Id.* at 455-57. The court rejected the participant's argument that, if relief were granted, her employer would pass the savings to its employees in the form of a higher salary or

additional benefits. "We find this reasoning far too speculative to serve as the basis for a claim of individual loss and thus conclude that Horvath lacks standing to seek restitution or disgorgement." *Id.* at 457.

In *Harley*, participants in a "richly funded" defined-benefit pension plan that had a substantial surplus sued to recover investment losses sustained by the plan as a result of an allegedly imprudent investment. Rejecting arguments advanced by the plaintiffs and their *amicus*, the Department of Labor, the Eighth Circuit held that plaintiffs lacked Article III standing because the "Plan's surplus was sufficiently large that the Granite investment loss did not cause actual injury to plaintiffs' interests in the plan." 284 F.3d at 907. "[T]he limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered no injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan." *Id.* at 906.[7] Petitioners have not cited a single case that reached a contrary result.

III. The Decision Below Does Not Conflict With Any Prior Decision of This Court

1. Petitioners argue (Pet. at 17-26) that the Ninth Circuit misapplied this Court's "injury-in-fact" precedents in holding that they failed to establish a redressable injury to themselves. An alleged misapplication of a correctly stated legal principle, however, does not ordinarily merit review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

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[7] Other courts have also ruled that plan participants cannot proceed on claims under Section 502(a) without satisfying Article III standing requirements. *See Doe v. Blue Cross Blue Shield*, 173 F. Supp. 2d 398, 404, 407 (D. Md. 2001); *Caranci v. Blue Cross & Blue Shield*, 194 F.R.D. 27, 32 (D.R.I. 2000); *Ehlmann v. Kaiser Found. Health Plan*, 20 F. Supp. 2d 1008, 1010 (N.D. Tex. 1998), *aff'd*, 198 F.3d 552 (5th Cir. 2000).

In any event, the court below correctly determined that petitioners suffered no redressable injury to themselves that would satisfy Article III standing requirements. Pet., App. A at 4a. Petitioners' contention (Pet. at 18-20) that *the plans* would benefit from an "infusion" of "millions of dollars" in additional funds if petitioners were to prevail on their claims falls far short of establishing a redressable injury to themselves individually. As the court below recognized, infusing the Plans with additional funds would not require ALCOA and Kmart to reduce petitioners' co-payments and contributions, which is the only way to redress their sole claimed injury. Pet., App. A at 4a. Indeed, rather than reduce petitioners' co-payments and contributions, "ALCOA and K-Mart would be free to reduce their contributions or cease funding the plans altogether until any such funds were exhausted." *Id.* Moreover, as the Department of Labor has conceded, the Plans would not violate ERISA's anti-inurement rule[8] by using any such additional funds to pay prescription drug benefits without reducing participant co-payments and contributions. *See* Pet., App. E at 31a ("the Plans' sponsors may take any recovered rebates and discounts and use these funds at their own disposal").

The Ninth Circuit's determination that petitioners failed to establish "redressability" is consistent with this Court's precedents. Where, as here, a plaintiff's claimed injury arises from decisions made by an independent actor not before the court, "it becomes the burden of the plaintiff to adduce facts showing that" the third party can be expected to behave "in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562 (citations omitted). No standing exists when the independent actor retains "broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO*, 490 U.S. at 615; *Lujan*, 504

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[8] ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1).

U.S. at 562; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-44 (1976).

Petitioners confirm the speculative nature of their theory of redressability by quoting the following passage from the Department of Labor's *amicus* brief in the court below: "If the rebates and discounts are returned to the Plans, *it is possible* that the resulting cost reductions or monetary relief to the Plans will benefit the participants and beneficiaries in the form of lower co-payments and less restrictive formularies, and *possibly* a more comprehensive benefit structure." (Pet. at 8-9 n.18, 24 (citation and internal quotations omitted; emphasis added)). Plan sponsors, of course, have complete discretion to adjust employee co-payments and contributions or leave them unchanged as they see fit. *See Black & Decker Disability Plan*, 538 U.S. at 833. That there is no redressability under these circumstances is underscored by petitioners' admission that "[w]e don't know what the fiduciaries are going to do with the money." SER 56.

This Court has affirmed the dismissal of cases based upon similarly speculative theories of injury. In *Warth v. Seldin*, 422 U.S. 490 (1975), for example, the plaintiffs challenged the legality of exclusionary zoning practices by Penfield, a suburban community near Rochester, New York. The plaintiffs included Rochester taxpayers who claimed to be injured financially by Penfield's exclusionary regulations. *Id.* at 508. The Rochester taxpayers asserted that "Penfield's persistent refusal to allow or facilitate construction of low-and moderate-cost housing force[d] the city of Rochester to provide more such housing than it otherwise would do," *ibid.*, and that Rochester taxpayers would be required to bear higher local property taxes to pay for such housing. *Id.* at 508-09. The Court held that these allegations failed to establish the requisite causal nexus between Penfield's zoning regulations and the taxpayers' alleged injury:

> Apart from the conjectural nature of the asserted injury, the line of causation between [the suburb's] actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

Id. at 509; *see also ASARCO*, 490 U.S. at 614-15; *Simon*, 426 U.S. at 28-33; *Allen v. Wright*, 468 U.S. 737, 752-53 (1984).

The cases cited by petitioners (Pet. at 20-22) did not present such speculative theories of redressability. In *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), the Court held that Massachusetts had standing to challenge the EPA's refusal to regulate greenhouse gases under the Clean Air Act. In particular, the Court determined that EPA's conduct created an "'actual'" and "'imminent'" risk of harm to Massachusetts from global warming, and that there was a "'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk." *Id.* at 1455 (citation omitted). The EPA did not dispute the existence of a causal connection between greenhouse gas emissions and global warming. *Id.* at 1457. Although China and India are likely to increase greenhouse emissions over the next decade, the Court determined that the redressability requirement was satisfied because "[a] reduction in domestic emissions would slow the pace of global emissions increases, *no matter what happens elsewhere*." *Id.* at 1458 (emphasis added). In this case, by contrast, petitioners' only purported injury is that their co-payments and contributions have been increased, and there is simply no evidence that ALCOA or Kmart are likely to do anything different with respect to petitioners' co-payments and contributions if they prevail.

The other cases cited by petitioners—*Bryant v. Yellen*, 447 U.S. 352 (1980) and *Clinton v. City of New York*, 524 U.S. 417 (1998)—also presented injuries that were likely to be

redressed by a favorable decision. In *Bryant*, the district court held that a rule generally limiting water deliveries from reclamation projects to 160 acres under single ownership did not apply to much larger tracts of the Imperial Irrigation District in southeastern California. Application of that 160-acre limit would have given owners of these larger tracts an incentive to sell excess lands at prices below the prevailing market price for irrigated land. The Court held that farmers who hoped to purchase the excess lands had standing to appeal because it was "likely that excess lands would become available at less than market prices" if the judgment were reversed. 447 U.S. at 368. Again, petitioners in this case failed to establish any such likelihood that their co-payments or contributions would be reduced if they were to prevail.

In *Clinton*, the Court held that a farmers' cooperative had standing to challenge the President's exercise of authority under the Line Item Veto Act to cancel a tax provision that Congress enacted to permit sellers of food processing facilities to defer recognition of gain if they sell their stock to a cooperative. 524 U.S. at 432. Under existing law, sellers of such processing facilities could obtain the benefits of tax deferral only by selling to a business corporation, not by selling to a farmers' cooperative. *Id.* at 423-24. The Court held that, by depriving the farmers' cooperative of a statutory "bargaining chip" in its negotiations, the cancellation inflicted an "immediate" and "concrete" injury sufficient to satisfy Article III standing requirements. *Id.* at 432-34; *see also id.* at 435 n.23 ("The injury in the present case is comparable to the repeal of a law granting a subsidy to sellers of processing plants if, and only if, they sell to farmers' cooperatives."). Unlike the farmers' cooperative in *Clinton*, petitioners in this case were never deprived of a "bargaining chip"—instead, they argue that the recovery they seek for the plans would *create* some type of "bargaining chip" that would enable them to put "pressure" on their employers. Pet. at 22-23. Apart from the lack of evidence that the ALCOA and Kmart

plans have ever been the subject of any such "bargaining," this argument just ignores the Article III "injury" requirement altogether.

2. Contrary to petitioners' argument (Pet. at 26-30), the decision below is entirely consistent with this Court's "representational standing" precedents. As the Court explained in *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996), representational standing is confined to relationships "recognized either by common-law tradition or by statute" that "rebut the background presumption . . . that litigants may not assert the rights of absent third parties." *Id.* at 557 (footnotes omitted). Petitioners cannot satisfy that requirement.

This Court has been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder does not wish to assert. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). As uninjured plan participants, petitioners are not the best proponents of the plan's rights. Unlike the plan's fiduciaries, participants have no duty to represent the interest of the plan or its participants and beneficiaries. Nor do participants have any authority to bind the plan to a judgment or settlement of claims they purport to assert on the plan's behalf. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citing Restatement (Second) of Judgments § 41(1) (1980)); *see also Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880-883 (6th Cir. 1997). "The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them." *Singleton*, 428 U.S. at 114.

That the Secretary of Labor, plan fiduciaries, and participants and beneficiaries all have *statutory* standing to bring an action for relief to the plan does not establish Article III

standing. Petitioners' argument to the contrary (Pet. at 26-27) is nothing more than a variant of the "statutory abrogation of Article III" approach to standing that this Court has repeatedly rejected. *See Gladstone, Realtors*, 441 U.S. at 100; *Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). Following petitioners' argument, Congress could simply eliminate the constitutional requirement of injury in fact and authorize any private person to bring actions for violations of federal employment laws. The bedrock standing principles recognized by this Court cannot be evaded so easily.

Petitioners' analogy of ERISA plan participants to "executors, trustees and guardians *ad litem*" is likewise misplaced. Pet. at 26. Petitioners not only fail to provide any law supporting this analogy, but they ignore the fact that it is only the plan fiduciary who, like an executor, trustee or guardian, has an obligation to act on behalf of the plan and the authority to bind the plan to a judgment or settlement. *See Bittinger*, 123 F.3d at 880. As the court below observed, "[t]rustees and executors . . . have a stake in the litigation because they are acting on behalf of the estate, which owns the claims being litigated." Pet., App. A at 6a-7a.

Nor do petitioners identify any common-law tradition that permits a plan participant to sue or be sued on behalf of the entire plan. ERISA's provisions "are guided by principles of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); *see also Varity Corp.*, 516 U.S. at 497. Under the common law of trusts, beneficiaries whose interests in a trust are not injured do not have standing to bring an action for fiduciary breach on behalf of the plan. Restatement (Second) of Trusts § 214 cmt. b (1959) ("A particular beneficiary cannot maintain a suit for breach of trust which does not involve any violation of duty to him."); A. Scott & W. Fratcher, *Law of Trusts* § 214 (4th ed. 1988) ("In order to maintain a suit . . . the beneficiary must show that his interest is involved").

Furthermore, there is no basis for petitioners' contention (Pet. at 27-28) that they have "representational standing" to sue on behalf of the Secretary of Labor. On the contrary, "private plaintiffs do not adequately represent, and are not charged with representing, the broader national public interests represented by the Secretary." *Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1424 (11th Cir. 1998). Recognizing that the Secretary's interests are "wholly distinct and separate" from those of plan participants, courts have uniformly held that ERISA actions brought by plan participants do not bind the Secretary under principles of res judicata or claim preclusion. *Id.* (citing cases).

Petitioners' invocation of *Vermont Agency* (Pet. at 28) is likewise unavailing. There, the Court upheld the standing of a private relator to bring a qui tam civil action "for the person and for the United States Government . . . in the name of the Government." 529 U.S. at 769 (citation omitted). If the government declines to intervene, the relator stands to recover 25-30% of the total award as a "bounty"; if the government takes over the case, the relator still gets 15-25% for his whistleblowing. *Id.* at 769-70. Hence, the Court had little trouble concluding that as to his portion of the recovery, "a qui tam relator has a 'concrete private interest in the outcome of [the] suit.'" *Id.* at 772 (quoting *Lujan*, 504 U.S. at 573) (alteration in original).

In seeking to identify the origin and nature of a relator's rights, the *Vermont Agency* Court expressly rejected the idea that the relator acts merely as agent of the United States and that the "bounty" is simply a fee received "out of the United States' recovery . . . ." 529 U.S. at 772. The Court pointed out that the statute itself gives the relator "an interest in the lawsuit, and not merely the right to retain a fee out of the recovery." *Id.* *Vermont Agency* thus involved a markedly different statute that actually assigned part of the government's claim to the plaintiffs. Petitioners have no statutory

basis to assert such a claim here, and cannot show that they would receive a portion of any monies that would be recovered by the plan in this lawsuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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